A TREATISE

ON THE

LAW

OF

WILLS AND CODICILS.

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A

TREATISE



WILLS AND CODICILS.

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PRESUMPTIONS AND PAROL EVIDENCE.

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Double Portions.

THE rule prevailing in courts both of law and equity, that external evidence may be received to REBUT PRESUMPTIONS, submits the operation of written instruments, more extensively than any principle hitherto noticed, to the controul of extrinsic circumstances. In Courts of Equity, more especially, this allowance has prevailed. The genius of the common law inclines it to generality and certainty, and even its presumptions are in some cases too inflexible to be disproved. But equity, as its rules are framed more for particular than general relief, allows all its presumptions to be repelled by opposite testimony, and by testimony of every kind.

Of the presumption against double portions.

Thus it is a settled rule of presumption in equity, (borrowed from the civil law) that if a father gives a legacy to a child, and afterwards advances the like sum to the same child, such advancement operates as an ademption of the legacy. This presumption was opposed in Ellison *v.* Cookson[a], by extrinsic evidence, consisting of declarations and correspondence, which were admitted on the above doctrine of receiving parol evidence against presumptions; though, as, in the opinion of the court, the evidence when received did not with sufficient clearness demonstrate any intention of the testator opposed to the presumption, the presumption prevailed. In Debeze *v.* Mann[b], (which, indeed, was the case of a father and putative child, but the legacy being *expressed* to be for a portion it came up to the principle upon which the presumption is founded in the case of a general legacy by a lawful parent) (1) the presumption was repelled by parol evidence of words used in conversation, clearly importing a design to better the child beyond the extent of the advancement, and because there was no way of carrying into effect such design, but by construing the legacy to be unadeemed.

The doctrine of the Court of Chancery seems to be this; that where a parent gives a legacy to a child, *without stating any purpose for which it is given,* it

[a] 1 Vez. Jun. 100. [b] 2 Br. C. R. 165.

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(1) The cases of a natural child, vide Grave *v.* Lord Salisbury, 1 Bro. C. R. 425. and of uncle and niece, vide Shudall *v.* Jekyll, 2 Atk. 516. are said to be out of the rule.

is nevertheless to be understood as a portion, and therefore on the principle of leaning against double portions, if the father afterwards advances a portion on the marriage of that child, it is an ademption of the legacy by a constructive satisfaction of it in the whole or in part. But if a stranger gives a legacy to a child, *not describing it as a portion*, and afterwards makes such advancement by way of marriage portion, such subsequent advancement will not be construed an ademption or satisfaction of the legacy. In the case of a stranger either the legacy must be described as a portion, or the advancement must be expressly stated, or distinctly appear, to have been made for the very purpose of satisfying the legacy. In such a case, although the advancement is expressly made by way of marriage portion, still if the legacy is not expressly given for the same purpose, such advancement will not operate as an ademption.

It follows, therefore, that as the law does not recognize the relation of the putative father and legitimate child, the father stands as a stranger; and thus the case of an illegitimate child has in this respect an advantage over one legitimately born; since if a legacy, be given to him by his putative father, such legacy will not be covered by any subsequent advancement unless it appears positively that such advancement was intended to be a satisfaction of the legacy. A legacy from a father is understood as a *portion*, though not so described; what he gives thus to his child is presumed to be meant by way of provision, as paying a debt of love and natural affection; if, therefore, he afterwards advances him by a provision in his lifetime such provision is considered as given in the same spirit and feeling, and as paying the same debt of na-

ture which he had intended to discharge by his will. But in the case of a stranger, what he gives by his will he gives as a mere bounty, and what he afterwards advances, he gives as an addition to his first bounty. Where these double gifts take place between parent and child the presumption of satisfaction takes place notwithstanding slight circumstances of difference between the advancement and the portion, and a difference in the amount[c].

And it would seem that where a testator standing or acting in loco parentis, after giving a legacy to the object of his care, makes a provision in his lifetime for the legatee, such advancement will be presumed to be in satisfaction. At least parol evidence will be easily let in to shew that the legacy was intended as a provision or portion[d].

[c] Pye ex parte Dubost ex parte, 18 Vez. Jun. 140.

[d] 7 Vez. Jun. 508. and Monck *v.* Lord Monck, 1 Ball and Beatty's Reports, 298.

Section II.

Debts paid by Legacies.

IT is also a rule of presumption well established in Courts of Equity, that where a legacy is given by a debtor to his creditor, exceeding, or equal to, the amount of the debt, it is a satisfaction of the debt. This rule of presumption, though established, is met by another, viz. that every bequest is *prima facie* a benevolence (1); on which ground the courts have of late viewed it with great jealousy, and have shewn a very ready disposition to take cases out of it, wherever any thing could be collected from the will, indicative of a contrary intention in the testator (2).

Of the opposite influences of the conflicting rules—that *a debtor is not to be presumed to intend a gift to his debtor*, and, that *legacies imply a bounty.*

(1) See the remark of Lord Chancellor Talbot in Fowler *v.* Fowler, 2 P. Wms. 353. and of Lord Hardwicke in Richardson *v.* Greese, 3 Atk. 68. who there says, that the maxim of *debitor non præsumitur donare* would not hold, if it were to be reconsidered. And again, that "legacies naturally imply a bounty." And observe what was remarked by Lord King, in reversing the decree of the Master of the Rolls, in Chauncey's case, 1 P. Wms. 410. Lord Alvanley also called it a very absurd rule, 3 Vez. Jun. 466.

(2) I do not undertake to enumerate all the circumstances which will take a case out of the operation of this rule of presumption. The following, however, are the most prominent. Where the payment of debts is particularly mentioned in the will, Chauncey's case, 1 P. Wms. 409. If the legacy is contingent, Spinks *v.* Robins, 2 Atk. 491. Postponement of the period of the payment of

But notwithstanding the strong disposition of the courts to bound the application of this rule of presumption, parol evidence has been refused by great chancellors to be admitted to take a case out of its operation. Thus in Fowler *v.* Fowler[a], Lord Talbot, after having at the same time declared his disapprobation of the maxim, and his apprehension of the danger of attempting to alter it, observed that, though in some cases (3) parol evidence had been allowed, in order to shew that the testator designed to give the legacy, exclusive of the debt; yet his opinion was against admitting such evidence, for then the witnesses and not the testator would make the will. And in Richardson *v.* Greese[b], Lord Hardwicke, after remarking that the court had always shewn itself dissatisfied with the rule, and had been fond of distinguishing cases out of it, observed that these distinctions were not to be taken from particular circumstances dehors the will, but must be found in the will itself.

Of the distinction

Whether the rule is a rule merely of presumption

[a] 3 P. Wms. 353. [b] 3 Atk. 60.

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the legacy, Clarke *v.* Sewell, 3 Atk. 96. Nicholls *v.* Judson, 2 Atk. 300. Uncertainty as to duration or commencement, Matthews *v.* Matthews, 2 Vez. 635. The subjects of the debt and legacy not being *ejusdem generis*, Broughton *v.* Errington, 7 Bro. P. C. 12. Eastwood *v.* Vincke, 2 P. Wms. 614. Where the debt is incurred after the date of the will, Cranmer's case, Salk. 508. Thomas *v.* Bennett, 2 P. Wms. 341. Fowler *v.* Fowler, 3 P. Wms. 354. Where the legacy is to a servant, 3 Atk. 69. by Lord Hardwicke.

(3) This had been positively so adjudged, thirty years before, in Cuthbert *v.* Peacock, 2 Vern. 593.

or of settled and fixed construction, seems to be the true question upon which these decisions turn; for where a positive rule of construction is established by the maxims or practice of the court, the instrument to which such positive rule of construction applies, becomes incapable of any other sense or operation; so that to oppose such construction, is to contradict the instrument itself.

between presumptions and positive rules of construction.

If, therefore, this presumption of a legacy's being a satisfaction of a debt could be shewn to be established upon a technical and positive rule of *construction*, a sufficient reason would appear for the rejection by the courts of all extrinsic evidence to oppose its operation, however easily such an odious rule might give way to opposite inferences, arising out of the context and apparent design of the instrument itself.

In the case of double portions, when the testator subsequently advances the legatee, the *presumption* is not connected with any rule of *construction*, since the will is in that case not affected by construction, but, pro tanto, *revoked* by a presumption arising entirely out of an act of the testator posterior to the will: but where a legacy is presumed a satisfaction, the will has an *operation* and *construction*; though, by being made to act upon a sum already due to the legatee, the benefit, *primâ facie* intended, is lost.

SECTION III.

Double Legacies.

Double legacies by the same instrument.

WHERE the same thing is given to different persons by the same instrument, the decisions must necessarily turn *wholly* upon construction. And though the rule of construction is differently stated by very high authorities, some considering the last bequest as revoking the first, others regarding both as co-operating to effect a joint-tenancy, and others again regarding them as rendering each other void for uncertainty; yet I conceive, that, whichever of these opinions be right, parol evidence is to have no share in determining the operation. But the question is opened again, if we advert to the case of two legacies to the same person by *different* instruments, in which the rule of construing the bequests accumulative, seems to rest upon a slight foundation [a], and to be easily repelled by *internal* evidence. But it is still a matter of enquiry, how far extrinsic evidence can be received for this purpose [b].

By different instruments.

In Barclay *v.* Wainwright [c], his Honour referred it to the Master to enquire, whether the several persons, legatees by the first codicil, to whom *no* legacies were given by the second, were dead, or not, in the service of the testator at the date of the second

[a] James *v.* Semmens, 2 H. Bl. 213.

[b] See Cliffe *v.* Gibbons, 2 Lord Raym. 1324.

[c] 3 Vez. Jun. 462.

codicil, and such facts were received for the sake of assisting and elucidating the internal evidence, by shewing that the omission of certain legatees named in the will, did not spring from any new intention of the testator.

The same Judge, in a case of double legacies, which afterwards came before him[d], upon the question, whether the parol evidence could be admitted, observed, that "if it is an established rule that two legacies are accumulative, where they are given by different instruments, he could not raise a presumption by evidence against it, and he was inclined to think it must be taken to be a rule." The rule was also laid down in Ridges *v.* Morrison[e], by Lord Chancellor Thurlow—"that where a testator gives a legacy by a codicil as well as by his will, whether it be *more, less,* or *equal,* to the same person who is legatee in the will, it is an accumulation." The same Chancellor adds, that it is incumbent upon the executor to produce *evidence* to the contrary, if he contest such accumulation. But the *species* of evidence to which his Lordship afterwards adverts, is wholly internal, and arising out of the context of the instruments. The rule, as laid down in the case just alluded to, was adopted from Hooley *v.* Hatton, (see the note at the end of the case of Ridges *v.* Morrison,) which case of Hooley *v.* Hatton, Lord Thurlow observed, was examined with abundant care, and he accompanied that observation with a remark, that it was unnecessary to repeat the cases after reading the very able opinion of Mr. J. Aston, which, he

State of the doctrine as to the presumption of the courts in the cases of double legacies, in the same, and in distinct instruments.

[d] Osborne *v.* Duke of Leeds, 5 Vez. Jun. 269.

[e] 1 Bro. C. C. 389.

said, contained the whole doctrine of the law upon the subject.

The state of the presumption, according to the varying circumstances of the case, seems to be settled by the result of the authorities upon the following criteria, viz. where the same *specific thing or corpus* (as a diamond ring, where the testator has but one,) is twice given to the same person, either by the same instrument, or by different instruments, there, in the nature of the thing, it is but a repetition.—Where the same *quantity*, as 100*l*. is twice given by the *same* instrument, the presumption *simpliciter* is against the legatee:—But where the same *quantity* is given by the same instrument, with any additional cause assigned for it, or with any material circumstance of variation accompanying the second gift, the presumption is turned against the executor, in favour of the accumulation.—Where equal sums are given in two *distinct* writings, or a larger after a less, or a less after a larger, the latter gift is construed an accumulation.

But though the presumption in a case, wherein two legacies of the same sum or quantity occur in distinct instruments, leans against the executor, yet it is only a presumption *simpliciter*, and is turned the other way where the same cause is expressly assigned in both instruments for the gift without any additional reason [f].

And it seems also, according to Lord Hardwicke [g],

[f] Menochius de præsumptionibus, lib. præs. 128, num. 4, 13, 14, and see Swinb. part 7, c. 20, fol. edit. 550.

[g] 2 Atk. 640.

that where, in a distinct instrument a *larger* legacy is given to the same person, assigning, in *totidem verbis,* and with a perfect identity, the same cause which was expressed in the former instrument, this shall not be a double legacy; with which position, Aston J. in Hooley *v.* Hatton, appears to agree, and the same doctrine seems to be held by Lord Thurlow, in Ridges *v.* Morrison above cited, and is stated to be the rule by *Menochius*[h].

Whether parol evidence is admissible to determine this question?

It is to be remarked, that in the above-mentioned case of Hooley *v.* Hatton, which is a very leading authority, no idea appears to have been entertained of the admissibility of parol evidence. Mr. J. Aston opened with observing, that as in the case before him, there was no *internal* evidence, therefore, he must refer to the general rule of law. And the Lord C B. Smythe observed, "the intention is the clearest rule; but it is admitted on all hands, here is no *internal* evidence, we must therefore refer to the rule of law." And lastly, by the Lord Chancellor Bathurst, it was said, that "no argument could be drawn in the case before him from internal evidence, they must, therefore, refer to the rule of law."

What Lord Thurlow's opinion was, as to the admissibility of parol evidence, does not expressly appear in the above-mentioned case of Ridges *v.* Morrison, but it is to be observed, that in illustrating his remark, "that slight circumstances may operate in proof of the testator's intention," he specified such only as could be collected from the context of

[h] Lib. 4, præs. 128, and see Swinb. 4to edit. 201. See also the recent case of Benyon *v.* Benyon, 17 Vez. Jun. 34

the instruments. And in Campbell *v.* the Earl of Radnor[i], the decision turned upon the words of the instruments. But in Coote *v.* Boyd[k], the point respecting parol evidence came directly under adjudication, in which Lord Thurlow laid down the rule thus, "the question, whether by giving two legacies, the testator did not intend the legatee to take both, is a question of presumption *donec probetur in contrarium,* and will let in *all sorts* of evidence." And the same Chancellor further observed, (what the temper of later decisions seems inclined to adopt, as the true and practicable distinction) that "*where the question arises upon the construction of words simply, qua words, no evidence (i. e. extrinsic evidence) can be admitted.*"

Whether his Lordship would have been ultimately governed by these maxims, if the decision of the case had depended upon it, cannot be known, since the case was determined upon the *internal* evidence of the will and codicil themselves. It was much contended, that it was a case of presumption, and that *all* presumptions were open to be encountered by parol evidence.

[i] 1 Bro. C. R. 271. [k] 2 Bro. C. R. 521.

SECTION IV.

Ambiguities.

THE instance most frequently chosen as the example of the *ambiguitas latens*, is that of a devise to a person of the same name with another, without any specific description appearing upon the face of the will, to designate the real object of the testator's bounty[a]. The case put by Lord Hobart, was that of a devise by a testator to his son John, having two sons of that name; and the same Judge having a little above decisively declared, that a testator's intent must be expressed in a will written, that it may be certain to the Court, observed on the case just put, that an averment might make this, *i. e.* who was designed by the testator, certain. The case and the comment contain together a true description of the *ambiguitas latens*, to constitute which there ought to be a positiveness and certainty of verbal expression becoming ambiguous in sense by the discovery of a matter not appearing in the instrument. This is the ambiguity latent, which, as it is created by facts, so it is removeable by a further investigation of facts.

A husband devised to his wife 700*l.* East India Stock, having no East India Stock; but he had 700*l.* Bank Stock; and the words were held to carry the

[a] See 5 Rep. 68. Lord Cheyney's case. Hob. 32. Counden *v.* Clark, 3d point, and 1 Salk. 7. Lepcot *v.* Brown.

Bank Stock, it being only an error in description[b]. Lord Hardwicke said it was only error demonstrationis, and was no more than the devise of a black, where the testator had only a white horse. Thus also, where A. devised to J. S. those his lands, in B., in the county of S., in the possession of D. A. had no lands in that county, but had lands in B., in the county of H., in the possession of D. It was held that the lands in the county of H. passed by this devise[c]. Upon the same principle it has been held that where one devised all his freehold houses in A., having none there but leasehold, the leasehold should pass[d]. But though a testator may have mistaken his property, it does not follow that a disposition, made under such mistaken impression, shall not have its literal effect. Thus, where a testatrix, reciting that she was possessed of 12,700*l.* 3 per cent. consolidated Bank Annuities, standing in her name, gave and bequeathed the same, or so much of such Bank Annuities as should be standing in her name, at her death; and at the date of her will and at her death she had near 15,000*l.* in that fund, only the 12,700*l.* was held to pass; the recital being considered as involving the reason of the disposition[e].

Of mistakes in the names of persons.

The names of persons appointed to take, under wills[f], have been set right by parol evidence, where both the christian and surname have been mistaken. In such case, no words are *supplied* or *substituted*, but the mistaken appellation in the instrument is ap-

[b] 1 Vez. 255, Door v. Geary. [c] 1 Ld. Raym. 728.

[d] 1 P. Wms. 286. Addis v. Clement, 2 P. Wms. 456. 2 Atk. 451. Cro. Car. 493.

[e] 15 Vez. Jun. 319. Hotham v. Sutton.

[f] And see Hodgson and Caldecot v. Fitch and Anr. 2 Vern. 593.

plied to the person really intended by it, and the names of persons having no intrinsic meaning, the will is rectified without any alteration of the sense.

Name mistaken, where the name used happens to belong to a person in being, and who might be in the testator's contemplation.

There may be a distinction, indeed, between such mistaken use of a name, which, though a wrong appellation of the object of the testator's bounty, happens to belong to an existing person within the testator's knowledge and possible contemplation, and that of a name under which there is nobody[g] to claim, as coming within its literal description. Thus in Beaumont *v.* Fell[h], where the point arose upon a bequest in a will to Catherine Earnley, and the name of a person who claimed a legacy as the real object intended to be benefited was Gertrude Yardley, it was first shewn by her, and admitted, that no person called Catherine Earnley claimed the legacy, and then evidence was offered to shew that the scrivener, who took instructions for drawing the will, had made the mistake. The court established the claim of Gertrude Yardley, (1), but not without observing how very material it was to the case that no such person as Catherine Earnley claimed the legacy (2).

[g] Rivers's case, 1 Atk. 410. [h] 2 P. Wms. 141.

(1) Edge *v.* Salisbury, Ambl. 71. Gines *v.* Kemsley, 1 Freem. 293. Dorset *v.* Sweet, 1 Ambl. 175. Parsons *v.* Parsons, 1 Vez. Jun. 266. and see particularly the case of Del Mare *v.* Rebello, 3 Bro. C. R. 246.

(2) In the case of Del Mare *v.* Rebello, 3 Bro. C. R. 246. the devise was to the children of the testator's sisters, Estrella and Reyna; Estrella had children, Reyna had none, and had changed her name and become a nun professed. But the testator had a third sister, Rebecca, who had children. The Chancellor would not substitute the name of Rebecca for Reyna.

What ambiguity is created by devise to a person's family.

On the other hand, the Court of King's Bench treated the case of Doe on the demise of Hayter *v.* Joinville[i], as affording an instance of an incurable ambiguity. A testator having devised to his wife's *family* one moiety of his residuary property, and to his brother's and sister's *family* the other moiety, died, leaving a brother and sister living, and both with a numerous issue, as well as the children of a deceased sister. It was judged impossible to construe the will with any rational certainty, so as to make a precise application of the word *family*. And this was a proper example of the ambiguity patent, as the uncertainty was considered as inherent in the term itself, which, unless the context of the will had defined its applicability, could scarcely receive explanation from any extrinsic circumstances (3). Again, where a testator devises to 'one of the sons of J. S.[k]' who has many sons, no regard can be paid to any thing extraneous to the will, as the medium of expounding the testator's intention (4).

[i] 3 East Rep. 172.

[k] 2 Vern. 625. Amb. 175. 2 Mod. Cas. in Law and Equity, 122.

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(3) But it has since been held in the Court of Chancery, that the word 'family' imports as definite an object of a devise as the word 'relations,' in respect to which that Court has, upon grounds of convenience, adopted the rule of the statute of distributions; so that it seems a bequest to the 'family' of another person, after the decease of such person, will be executed by the court in favour of his nearest of kin. Crewys *v.* Colman, 4 Vez. Jun. 319. and see post. the note in page 35, et seq.

(4) It has been before observed, that where a testator gives the same legacy in different parts of his will to the same persons, it is an ambiguity which, unless helped out by some rule of construction, no extrinsic evidence can be received to explain. As to the

It is true, in the last instance, the ambiguity does not fully appear, till from the words of the instrument the attention is directed to the predicament of the object to which the words apply, since, if in point of fact there was but one son, that son would be entitled; but still it is obvious, that the reference to external facts (if there were more sons than one) would confirm the patent ambiguity, already attaching upon the words which in themselves express uncertainty, and which suppose a plurality of individuals equally included within the *terms* of a gift intended for one only, and therefore present an ambiguity in the very face of the will (5).

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existence of any and what rule of construction in this case, there has been a great contrariety of opinion. See 2 Atk. 373. 3 Atk. 493. Plowd. Comm. English edit. 511, margin, where all the authorities are collected.

(5) I have transcribed the following note from Edward Altham's case, 8 Rep. 155, as furnishing several examples illustrative of the part of the subject above treated: "If A. levies a fine to William his son, to have and to hold to him and his heirs; upon this fine the Judge cannot make a question of any matter of law; but now the party comes and avers in fact, and says, that A. had two sons, named William, an elder and a younger, and that his intent was to levy the fine to William the younger; this averment out of the fine is good of this matter of fact, *which well stands with the words of the fine*, and shall be tried by the country. But if a man by deed gives goods to one of the sons of J. S. who has divers sons, here it shall not be averred which son was intended; for by *judgment in law* upon this deed, this gift is void for the uncertainty, which cannot be supplied by averment. So if a man levies a fine of the manor of S. or of the manor of D. to two *et hæredibus*, and in truth there is the manor of North S. and South S. or Great D. and Little D. in this case issue may be taken *dehors*, *which* manor the conusor intended to pass, for that is matter of fact, not apparent in the fine, whereof the judge cannot take conusance; but it *stands well* with

Of the mark of a patent and latent ambiguity.

If the ambiguity occurs in the wording of a will, producing a palpable uncertainty on the face of it, extrinsic evidence cannot remove the difficulty, without putting new words into the mouth of the testator, and, in effect, making a will for him. But if a will presents no ambiguity independently of facts, the un-

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the fine, and shall be tried by the jury. But where the words whereby the estate is limited are to two *et hæredibus*, that is apparent in the fine, and, by judgment of law, these words *et hæredibus* are uncertain and void, and no averment *dehors* can make that good which upon consideration of the deed is *apparent* to be void." Sometimes, however, there is a natural way of explaining the ambiguity by resolving it into a mistake. 1 Vez. 560. As where a testatrix gave and bequeathed unto *the two* servants that should live with her at the time of her death 100*l.* new South Sea stock to be equally divided between them, and in fact, though the testatrix had but two servants at the time of making the will, yet she afterwards took a third who lived with her at the time of her death. The Master of the Rolls, Sir Thomas Clarke, held that all the three servants should share equally; and his Honour added that if a testator had four servants and said, "I give to all the three servants living with me at my death," he thought all the four would be entitled to a share, and that the indefinite word *all* would have warranted the court in rejecting the word *three* as repugnant. The ground of this construction was the maxim of "ut res magis valeat quam pereat," for otherwise the bequest would be void for uncertainty. His Honour also cited a case of Tomkins *v.* Tomkins in 1745, where a testator gave to his sister 50*l.* and to her three children 50*l.* each, and in fact there were four children of the sister, the Chancellor was of opinion, that the words were indefinite, notwithstanding the word *three*, and were intended to take in all the sister's children. In Ongly *v.* Peed, 10 Mod. 103. where a man devised his land to A. and his brothers successive, and A. was by the verdict found to be the elder brother, the court were of opinion, that the will was good and certain enough; for being in the case of brothers the common law was a guide to the exposition of the word *successive*, viz. that the eldest should enjoy it first for his life, then the second, and then

certainty which arises must come from behind the instrument, and is in this consideration of the phrase with propriety called a *latent* ambiguity: and indeed to a certain extent extraneous evidence must be resorted to in establishing the title under any devise, since, let the words be ever so clear, the person designed can only bring himself within the description *in foro contentioso*, by proof of his identity.

The late Chief Justice of the King's Bench, in the case of Thomas *v.* Thomas, 6 T. R. 676, makes this observation: "It has been a long established rule, that where there is a latent ambiguity in a will, the parties may go into extrinsic evidence to render that certain, which, without the aid of such evidence, is uncertain; but here the evidence has itself raised the ambiguity; on the face of the will there is no uncertainty." This passage seems to imply, that where there is no uncertainty on the face of a will, but the evidence *raises* the ambiguity, the case is incurable. Possibly, however, his Lordship did not mean to be *so* understood, since there would be tautology in the phrase of *latens ambiguitas*, unless it imported an ambiguity not existing on the face of the instrument, but lying behind in the dubiousness of the objects to which its provisions were directed, and therefore capable only of being explained by reference to those objects through the medium of external evidence.

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the third: especially when he who was first named in the will was by the verdict found to be the eldest brother. Had the devise been to A. B. and C. to take successively, it would have been void for uncertainty.

The truth will be found upon consideration to be, that the state of facts *raises* the *latent* ambiguity [l], and may also *dissolve* it; but the *patent* ambiguity consists in the uncertainty of the language used, or in the vagueness of description or expression, and can be expounded only by the context and general sense of the instrument. Thomas *v.* Thomas [m], above referred to, was a case of the *ambiguitas latens*, wherein the words of the will comprised a clear and certain description, but the parol or extrinsic evidence raised the doubts respecting the intention of the testator. The state of facts in that case created the latent ambiguity; which facts were shortly these:

The testator devised lands to Mary Thomas, his grand-daughter, of Llechlloyd, in Merthyr parish, and it turned out in fact that the testator, at the time of his death, had a grand-daughter, of the name of Elinor Evans, who lived at Llechlloyd, in Merthyr parish, and a great-grand-daughter, Mary Thomas, an infant, of the age of two years, the only person of that name in the family; but it appeared that she lived at Green Castle, in the parish of Llangain, at the distance of some miles from Merthyr, in which place she had never been.

Here there was a person in existence to answer to the name in the devise; but she was neither the grand-daughter, nor living at Llechlloyd, in Merthyr parish; and there was another person, a grand-daughter, who was of Llechlloyd, in Merthyr parish, but to whom the *name* did not apply. The

[l] 1 Bro. 85. [m] 6 T. R. 676.

judge at nisi prius received the evidence (subject to the opinion of the Court as to its admissibility) to shew that the name of Mary Thomas was inserted by mistake for that of Elinor Evans; but the jury were not persuaded by it, so that the admissibility of that evidence did not come to be judicially decided. The contest between these claimants, to neither of whom the words of the disposition corresponded, opened the way by the uncertainty appearing on the parol evidence, for the title of the heir at law.

After it had been found that there was no mistake in the name, the question of course lay wholly between Mary Thomas, and the heir at law; or, in other words, the only consideration which remained was, whether the description was applicable, with sufficient certainty, to entitle her as the object of the disposition; in which shape of the contest the distinction which has been above shewn to have been taken in Beaumont v. Bell[n], in favour of those cases of defective dispositions, where the person intended was clearly perceived through the mistake, and no person was in existence to claim under the erroneous description, became very important; for though the jury had disallowed the pretensions of Elinor Evans, the court thought that in as much as the description both of place and relationship was applicable to her, such a degree of uncertainty as to the person intended was thereby introduced as was sufficient to exclude the application of the maxim of *falsa demonstratio non nocet;* for that rule will only apply *si constat de per-*

[n] 2 P. Wms. 241.

sona (6). And therefore, as Elinor Evans could not take because nothing but the description or *demonstratio* belonged to her, and there was a person in existence and claiming, to whom the name applied; so neither was Mary Thomas suffered to take under the devise, because nothing but the name applied to her, and the description both as to place and kindred was precisely appropriate to another person in existence and contending for the preference on these grounds (7).

Of the effects of a false or true description.

It is to be observed, that neither the christian nor surname of Elinor Evans agreed with the name in the will; but where the mistake has been only in the christian name, and the instrument has contained a full and exact description of the person so *imperfectly* designated by *name*, although there has existed another person *wholly* answering to the name in *both* particulars, the particularity of the *description* has outweighed the advantage on the other side arising

(6) But a true description will assist a wrong name, if there is no other person of the name. 2 Vez. 217. And if there is a *certain* description, and a further description is added, it is immaterial whether the superadded description be true or false. See Bradwin *v.* Harpur, Amb. 375. Which case presents an instance of a transposition of parties, the legacy intended for one being given to the other by a very evident mistake of the names. See this subject ably commented upon in Doe on dem. Harris *v.* Greathead, 8 East, 91. see also 8 East, 149.

(7) In this case, the first ambiguity was *ambiguitas latens*, for it only appeared by reference to outward circumstances; but though extrinsic circumstances produced the ambiguity, they offered no media for its explanation; and this is the proper description of an incurable latent ambiguity.

from the coincidence in both the christian and surnames. As where the devise was to the Rev. Charles Smith, of Stapleford Tawney in the county of Essex, clerk, and the legacy was claimed by the Rev. *Richard* Smith, of Stapleford Tawney, in the county of Essex, clerk. It was contended that one Charles Smith, an officer in the army, who had lived at Rumford in Essex, and had been dead some time, was intended, and that so the legacy had lapsed; but it was proved by the widow of Charles Smith, that he died before the testatrix made her will; and upon the court's manifesting a decided opinion against the executor and trustee of the residuary legatee, the point was given up, and a decree was made for the legacy, with interest, but without costs, in favour of the plaintiff, the Rev. Richard Smith (8).

The result seems to be, that wherever an ambiguity arises from the inapplicability of the name or description, as such ambiguity is produced by the state of facts, it is open to explanation by parol evidence, being properly an example of the *latens ambiguitas;* but still the evidence, when let in, may increase instead of lessening the degree of uncertainty, or it may fall short of affording that degree of inference, which is requisite to decide the court or the jury.

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(8) 6 Vez. Jun. 42. Smith *v.* Coney. So in Parsons *v.* Parsons, 1 Vez. Jun. 266. and in Garth *v.* Meyrick, 1 Bro. C. R. 30. circumstances weighed in favour of a person imperfectly named against another person to whom the name belonged, but who clearly appeared not to be the person intended, when the circumstances of description, and the facts coming in upon parol evidence, were coupled together.

Of the effect of a blank left for the name of a legatee.

Thus much as to mistakes in the names and descriptions of persons, by which it appears, that very wide deviations and mistakes have been corrected by parol and extrinsic evidence. But when a *blank* is left for the name of a legatee or devisee, it is too much to set up an object of the testator's bounty, by any description of evidence. Thus in the case of Hunt *v.* Hort (9), where the testatrix directed that her other pictures (having made some previous specific bequests of pictures), should become the property of Lady ——, the Chancellor said he could not supply a blank by parol evidence; though there certainly were some strong circumstances in the will itself, to shew that Lady Hort was the person intended. But where there was a blank only left for the christian name, evidence was without difficulty read to shew the testator's intentions, with regard to the person answering to the surname °. And two initials of the person to whom a legacy is given, have been filled up by parol evidence of the person intended (10).

Some ambiguities *patent* are not incurable.

It must be allowed, that, in the last instance, the rule of admitting parol evidence in the case of an

° Price *v.* Page, 4 Vez. Jun. 680.

(9) 3 Bro. C. R. 311.; and the same point was adjudged in Baylis and Church *v.* the Attorney General, 2 Atk. 239.; and again in Castledon *v.* Turner, 3 Atk. 257.: and see Pym *v.* Blackburn, 3 Vez. Jun. 457.

(10) Abbott *v.* Massie, 4 Vez. Jun. 148.; and where a will is hardly legible, and the legacies are in figures, the court will refer it to the Master to examine what the legacies were. So where a legatee's name was falsely spelt, it was referred to a Master to see who was intended, 1 P. Wms. 425.

ambiguity latent, and rejecting it when offered to expound an ambiguity patent, becomes a little unsteady. Where a testator gives a legacy to Mrs. G. it is not easy to shew that the ambiguity which this imperfect designation creates is not an ambiguity arising upon the face of the will, and, as such, an ambiguity *patent.*

Perhaps we must allow that the rule is flexible to the extent of admitting extrinsic evidence in a few particular cases, where the ambiguity, though *patent*, arises from something short in the expression or designation of the objects of the testator's intention, and is of a nature calculated to receive an easy explanation from outward facts.

So in other cases, although the effect of a positive clause[p], is not to be controuled by inference from other parts of the instrument; yet if matter can be collected from the general context of the instrument, the *approach* to an ambiguity patent in a *particular* clause or sentence, will not exclude the admission of parol evidence, provided it tends to confirm this collective inference from the context. Indeed, *that* can scarcely be termed an ambiguity, which is capable of an exposition from other parts, or from the bearing and scope, of the instrument. And it is generally true, that where the context of the instrument reflects light upon an ambiguous passage, but not strong enough to decide the exposition with sufficient certainty, it may nevertheless afford a ground for the admission of extrinsic evidence. Perhaps, too, we may go a step further, and say, that where

Of the lights reflected upon particular passages by the context.

[p] Jones v. Colbeck, 8 Vez. Jun. 42.

such secondary grounds of construction are morally decisive, as may sometimes be the case, it may be doubted, whether any extrinsic evidence can be received to contradict it; for instruments are not to be construed piecemeal, but illustration is to be borrowed[q] from all the parts of them, to give light to particular passages.

In Ulrick *v.* Litchfield[r], the ambiguity was also upon the *face* of the instrument, but there was a bearing in the language of the will that assisted the sense; parol evidence was therefore, as it seems, very consistently and properly admitted, to decide the preponderance. The devise in Castledon *v.* Turner[s], upon which the question arose, was considered as receiving illustration from the other parts of the will, and from a natural order of preference, inferrible both from the instrument itself, and from the relation of the persons concerned; so that the particular uncertainty was expounded by a comparison with the general tenour and object of the will; yet the Lord Chancellor seemed to hold, that as it was a case in which there was an absolute omission of a devisee, no extrinsic evidence could be admitted. But the case, as it was regarded by his Lordship, did not stand in need of it, there being enough in the will for its own exposition. The point of the case was this:—W. bequeathed his lands to his wife for her life, and after her decease, to M. D. the niece of his wife, and proceeded thus: " Item, I give the use of 500*l.* stock for *her* natural life, but after *her* decease, I give the 500*l.* among my wife's brothers and sis-

[q] See Coker *v.* Guy, 2 Bos. et Pull. 565.
[r] 2 Atk. 372. [s] 3 Atk. 257.

ters." Lord Hardwicke considered this as a case of the absolute omission of a devisee, and nearly the same as where a blank is left for the name of the devisee, in which case parol evidence is always excluded.

Upon the whole it appears that whatever doubts may exist, whether in *any* case of a palpable ambiguity *patent,* any help can be borrowed from mere parol evidence, consisting of *words* and *declarations;* yet it seems to be settled in practice, that if the court can, from the lights furnished by the instrument itself, gain some foundation of conjectural inference, they will look out of the instrument itself to the situation of the parties or persons concerned (11). Masters *v.* Masters (12), was a strong case decided on this principle. There a testatrix gave a sum of money *to all and every the hospitals,* without saying where the hospitals intended by her were; but because it appeared that the testatrix lived at

The courts will sometimes look out of the instrument, and infer the intention from the situation of the person or property.

(11) In the case of Crone *v.* Odell, Ball and Beatty's Reports of Cases in the Court of Chancery in Ireland, page 449. we find Lord Chancellor Manners thus expressing himself on this point: "An argument has been urged by the counsel for the defendant (with a view to exclude the consideration of the state of the testator's family), that the court cannot travel out of the will for that purpose. The contrary, however, has been held to be law from the time of Wild's case, 1 Rep. 16. to the present time. In Goodinge *v.* Goodinge, 1 Vez. 231. the same argument was urged, and over-ruled by Lord Hardwicke; and his opinion on that point has been confirmed by the uniform decisions of courts of equity ever since.

(12) 1 P. Wms. 423. It appears also by this case, that a blank left in a codicil may sometimes be supplied from the will.

Canterbury, and moreover, that she took notice by her will of two Canterbury hospitals; the devise was held not to be void for uncertainty, but to have been intended for all the hospitals of Canterbury.

The same practice of looking out of an instrument to the situation of the parties concerned, for collecting inferences of intention, appears in the case of Harris *v.* the Bishop of London[t], which was thus: Talbot Barker being seised in fee of a real estate, as heir on the part of his mother's mother, and being also seised in fee of a very small estate of 4*l.* *per annum*, as heir of his own father, devised all these lands to trustees and their heirs, in trust to pay several annuities and charities; after payment of which, he devised the residue of the rents and profits of the premises to his own right heirs of his mother's side, for ever: and the question was, who should be entitled to the residue of the rents and profits; whether the heir of the mother's father, or the heir of the mother's mother. Here the court looked *beyond* the will to the testator's title to the property devised, and finding it to be derived through the mother's mother, decreed it to go the heirs of the testator on the part of his mother's mother.

This will perhaps appear, when properly considered, a stronger case than that of Masters and Masters; for although the extraneous matter was not introduced to explain an ambiguity patent, since in the words of the will there was no ambiguity at all; yet it was certainly resorted to by Lord Macclesfield, to annex a meaning to words beyond their legal effect;

[t] 2 P. Wms. 135.

the "right heirs of the mother's side," being a description properly applicable, in the first place, to the heir of the mother's father; nevertheless, as we have seen, the court gave the estate to the heir of the mother's mother, in deference to the argument drawn from the manner in which the estate had in fact devolved to the testator. And it is to be further noted, that in this case the Chancellor did not look out of the will to the title to the property (13) for the sake of deciding the judgment already inclined the same way by the context of the instrument, for it does not seem that the will afforded any internal evidence.

But the want of this internal evidence in the will itself, to justify the resort in the last-mentioned case to the external facts, makes the propriety of that decision at least *questionable*, if we regard the authorities on this head; and, perhaps, the consistency of legal principles was better consulted by the firmness of the decision of Lord Talbot, in the case of Brown *v.* Selwyn[u], which was shortly as follows: John Brown made his will, and after several dispositions of real and personal property, devised as follows: "And as to the rest, residue, and remainder of my estate, whether real or personal, whereof I am seised or possessed, or which I am any ways en-

[u] Cas. Temp. Lord Talbot, 240.; and see 4 Bro. P. C. 179.

(13) There are numerous cases where the descriptive force of words have been decided by reference to the circumstances of the property; as where words inapplicable in their proper sense to leaseholds or copyholds, have been held to include them out of regard to the actual situation of the testator's property. See these cases, *ante*, Vol. I. ch. 4.

titled to, I give and bequeath the same, and every part thereof, and all my right, title, and interest therein and thereto, unto such my executor or executors hereinafter named, as shall duly take on him or them the execution of this my will, his or their heirs, executors, administrators, and assigns, as tenants in common, and not as joint-tenants." And the testator afterwards appointed the plaintiff and defendant his executors, and died, and the plaintiff and defendant both proved the will. The defendant was, at the time of the testator's death, indebted to him in 3000*l.* and for securing thereof, had given a bond to the testator (14). The prayer of the bill was, that the defendant might account with the plaintiff for the testator's residuary property, and pay to him a moiety of the said sum of 3000*l.* with interest, and the cross bill was brought up to have the bond delivered up to be cancelled. It appeared by the answer of the defendant in the original cause, and by the proofs (15), that the testator really designed to give this money

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In equity a debt is not released by the creditor's making his debtor his executor.

(14) In equity, a debt is not released by a creditor's making his debtor his executor; but at law it is otherwise; and if a creditor makes his debtor *and another* his executors, the consequence at law is still the same; nor is this consequence varied by the fact of the debtor's administering, or not administering; the reason whereof is this, that the other cannot bring an action without joining him who refuses, and they cannot sue one of themselves for a personal thing. See this doctrine well treated of, in Plowd. Comm. 184. Woodward *v.* Lord Darcey.

(15) In courts of equity, these parol proofs are generally permitted to be read without prejudice. But at law, where the jury might, and probably would be, influenced, by the admission of such improper testimony, the production of it will not be allowed. See this distinction adverted to by Mr. Justice Powell, in Newton *v.* Preston, Prec. in Ch. 104.

to the defendant, and that he had actually instructed one Viner, the attorney who drew the will, to make this disposition accordingly; that Viner neglected to make mention of it in the will, insisting that the bond would be extinguished and released, of course, by Selwyn's being appointed executor; but that the testator appearing dissatisfied with Viner's opinion, a case was laid before counsel, who confirmed what Viner had said, relying upon which, the testator signed and published his will, with a full persuasion that the bond would be extinguished; and this appeared clearly to have been the intention of the testator.

It was impossible for parol evidence to be more decisive than that which was offered in this case, if it could have been received; but it is equally plain, that if the will were considered without the parol evidence, and the general devising words giving all the real and personal property, not before disposed of, to the residuary legatees, were only attended to, that this debt was included in the bequest, as falling under the description of personal estate. The Chancellor, although he declared it to be his private opinion that the debt was intended to be released to the executor, by whom it was owing, thought himself not at liberty to yield to the parol evidence, and to make a construction against the plain words of the will.

Although the case of Brown *v.* Selwyn, is not easily reconcileable with that of Harris *v.* the Bishop of London, yet it is not opposed to the doctrine of the admissibility of parol and extrinsic evidence, to decide the judgment already strongly inclined by

the context and external evidence of the instrument.

We may safely say that there is no rule which stands on a surer principle than this—that parol evidence is never to be admitted where there is no ambiguity to call for explanation, and where the will may operate according to the words without any such foreign help. If, on the other hand, there is no subject on which the words in their ordinary and received sense can operate, extrinsic evidence may be called in. But an intention in the testator beyond the natural meaning of the expressions used, is never to be gratuitously inferred. Thus in a late case in the Common Pleas, where there was an estate sufficient to satisfy the devise according to the proper meaning of the description of the premises, collateral evidence was held not admissible to shew that the testator meant to use the description in a more extensive sense. In that case the devise was of "all my estate of Ashton." The testator had an estate from the mother's side, and also a paternal estate. His maternal estate comprehended a manor, capital farm, and lands in the parish of Ashton, as well as several other estates, some in an adjoining parish, and some in parishes at the distance of ten or fifteen miles from Ashton. It was attempted to be shewn that the testator was always accustomed to call his maternal property his 'Ashton estate,' to raise the inference that he intended to devise the whole of his maternal estate by the name of his 'estate of Ashton;' but the court refused the evidence[r].

[r] Doe d. Sir Arthur Chichester, Bart. v. Oxenden, 3 Taunt. 147.

Section V.

Rules of construction not to be opposed by extrinsic evidence.

UPON the whole, the distinction, according to Lord Thurlow, seems to be this: that *all sorts* of evidence are admissible, with different degrees of weight and value, to rebut presumptions of equity (1), and even that constructive operation of an instrument which is referrible to presumption; but that where the question arises upon the construction of words, *qua* words, no extrinsic evidence can be admitted; still less can it be received to controul a technical rule of verbal construction (2).

Some equitable rules strict depend on evidence of

There are some equities arising upon written instruments, the strict and technical nature of which seems to place them clearly out of the reach of parol

(1) It has long been fully settled, that parol evidence is admissible to rebut a resulting *use*, Lord Altham *v.* the Earl of Anglesea, 2 Salk. 676. see also Roe, lessee of Roach *v.* Popham and others, Dougl. 2.

(2) When certain words have received a certain technical construction, we must abide by the decisions in construing such words, otherwise we shall be removing land-marks, by Kenyon C. J. and Lawrence, J. 6 T. R. 354.

evidence; by which are meant those which do not arise out of the presumable intention, or the moral and conscientious relations of parties; but out of an artificial system of jurisprudence, the maxims of which can be neither steady nor clear unless pursued to their consequences, and kept uniform in their application. This observation holds especially with respect to the rules which govern the succession to property; to which some equitable canons apply of a merely *positive* nature, and which are grounded on accident and habit, rather than principle or presumption. Such appears to be the rule which favours the real representative, by applying the personal estate in exoneration of the land, though *expressly* charged by the testator—a rule derived to us from the ancient policy of our ancestors, which has impressed on the law of landed property, its inveterate preferences in favour of the heir, whom it was anxious to qualify with the means of sustaining the duties of the feudal relation. Though it may be observed that the abolition of the feudal tenures, and the growing interests of commerce, have made the courts very ready to take cases out of a rule, which is considered as not agreeable to the situation of the times; still, however, it is left standing, and though living in dishonour, is of general obligation in courts of equity.

So too, the rules which apply to and modify the titles to real and personal property, (wherein the courts of equity hold a perfect agreement with courts of law), as, for example, such as concern the rights of representation and administration, the quantity of estates expressed by certain legal idioms, the compass and effect of limitations, and the descriptive

force of technical expressions (3), are not to be shaken by extrinsic evidence. Thus, that rule of construction which makes void a remainder of personal estate, limited upon a prior gift or assignment of the same to a man and the heirs of his body, and

Examples of rules of construction not to be opposed by extrinsic evidence.

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(3) That parol evidence cannot be admitted to contradict such legal signification and compass of words, see Kelly *v.* Paulett, Ambl. 605. The sense of words as fixed by legal authority, is not to be altered by external proofs of contrary intention. Thus, for example, the sense and scope of the word *Relations*, where there is a devise to persons by that general name, without any words of more specific designation, have been adjusted to the statute of distributions in courts of equity, and adjudged to comprehend only the nearest of kin, to the extent of the degrees within that statute: and extrinsic evidence will not be let in to shew that a greater or less compass was intended to be given to the word by the testator; vide Whithorne *v.* Harris, 2 Vez. 527. Roach *v.* Hammond, Prec. in Chan. 401. Harding *v.* Glyn, 1 Atk. 468. Green *v.* Howard, 1 Bro. C. R. 31.

Of the rule in construing a bequest to relations.

It may be useful as the point has occurred, to collect for the reader the decisions upon it, which are rather curious.

The construction does not render the will inofficious and nugatory, since the wife is excluded, not being within the meaning of the next of kin, but provided for by the statute by the name of wife. The statute of distributions marks the distinction between the next of kin and the widow. And the ordinary legal sense of the next of kin is never held to include the wife. Thus where a man devised his residue to be divided among his next of kin, as if he had died intestate, the words "as if he had died intestate," were rejected as surplusage, and the next of kin by blood only were held intitled under the will, Garrick *v.* Lord Camden, Patton *v.* Jones, 14 Vez. Jun. 372. So the marital right of the husband as administrator by law, is excluded by a limitation to the next of kin of the wife. Anderson *v.* Dawson, 15 Vez. Jun. 537. Neither is it without effect, though the persons to take under this construction be the same and only such as would take under the statute, for still their *shares* may be different; as if a testator di-

vests the absolute and ultimate interest in the first grantee or devisee, cannot be opposed by parol evidence. Accordingly in Stratton *v.* Payne[a], where the testator devised his personal as well as real estate to A. P. and the heirs of her body, with a limitation

[a] 3 Bro. P. C. 257.

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rects a sum to be equally divided among his relations, it must go to them *per capita*, and not *per stirpes*, see Thomas *v.* Hoole, Cas. Temp. Talbot, 251. Philips *v.* Garth, 3 Bro. C. R. 64. Butler *v.* Stratton, 3 Bro. C. R. 367. The rule of division is the same also where the bequest is to the next of kin, and there are brothers and brother's children. Though it is to be observed that under a bequest to the next of kin in *equal degree* if brothers or sisters are living, they will take in exclusion of the child or children of a deceased brother or sister. Wimbles *v.* Pitcher, 12 Vez. Jun. 433. If a legacy be given to the *descendants* of A. and B., equally, children and grandchildren take *per capita*. Northey *v.* Strange, 1 P. Wms. 342. and Blackler *v.* Webb, 2 P. Wms. 383. But Jones *v.* Beale, 2 Vern. 381. which carried a bequest to *relations* to the children of a cousin-german, living the parent, cannot be law; for the statute does not carry the representation among collaterals beyond the children of brothers and sisters.

At the conclusion of the case of Maitland *v.* Adair, 3 Vez. Jun. 232. we find a dictum of Lord C. Loughborough, that where a person bequeaths among his relations, those by affinity are not included. If however, the testator mark an intent to carry the word 'relations' beyond the extent of the statute, the court will effectuate the disposition, the statute being only adopted from necessity. But a legacy for a mourning ring to each of the testator's relations, by blood *or marriage*, was confined by the court to nearest of kin, according to the statute of distributions, and to those who had married persons entitled under it. See Davison *v.* Mellish, 5 Vez. Jun. 529. It has been held that an exclusive appointment, under a power of appointing to and among such of testator's relations as shall be living at the time of testator's death,

over in default of issue of A. P., the limitation over was adjudged void both by the Court of Chancery and the Lords, who concurred in rejecting parol evidence, (though it was the evidence of the person who drew the will), to shew an intention in the testator opposed to this construction.

Again, it is a rule of construction in courts, both of law and equity, that a devise to a man and his

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in such shares as the appointer shall please, is good, 1 T. R. 435. and where a trustee has the power of selecting, he may go beyond the statute of distributions, see Crewys *v.* Coleman, 9 Vez. Jun. 319. So where a person has a power of distribution among *poor* relations, he may distribute among all poor relations however remote: but wherever the court is called in to distribute, in failure of the person so empowered, it will confine itself to relations within the statute of distributions, Mahon *v.* Savage, 1 Ca. temp. Lord Redesdale, 111. and see Spring ex dem. Titcher *v.* Biles, 1 T. R. 435, note (f). If a testator give to his poor relations; one who is poor at the time of the death, but becomes rich before distribution, seems not to be entitled; and if a poor relation so entitled die before distribution, his claim is held not to be transmitted, id. It is to be observed, that as the property in these cases does not pass by virtue of the statute, (the court only taking it as their guide in ascertaining the persons to take), the shares and proportions are to be regulated according to the intent of the testator, Brunsden *v.* Woodridge, Ambl. 507. Butler *v.* Shalton, 3 Bro. C. C. 367. and in the late case in the Common Pleas, of Doe ex dem. Thwaites and others *v.* Over and others, 1 Taunt. 263. the statute was adopted as the guide for ascertaining the relations, to satisfy that term in a will where the subject was real property.

The word *family* denotes as definite an object of a devise as the word *relations*, and shall be expounded in like manner, Crewys *v.* Coleman, 1 Vez. Jun. 319. and observe that under a disposition by will to A.'s and B.'s families, the children are entitled exclusively of their parents, Barnes *v.* Patch, 11 Vez. Jun. 604.

heirs and assigns, or a bequest to one and his executors, administrators and assigns, conveys no original interest to the representatives, but by transmission only, and that consequently the devise or legacy fails if the devisee or legatee die before the testator; and this construction, though it operates to destroy *pro tanto* the will, cannot be opposed by parol evidence of the testator's contrary intention as to the devisee; which point was decided so long ago as in the case of Brett *v.* Rigden, in Plowden's Commentaries (4) upon the statutes 32 and 34 H. VIII. of wills, (which, like that of the 29 Car II. require a will to be in writing;) where, the evidence offered of the testator's declaration of his bountiful intention towards the heir of the deceased devisee was rejected, as being in derogation of those statutes of H. 8.; and the same point in respect to a *legatee* under similar circumstances, may be seen in the case of Maybank *v.* Brooks [b].

[b] 1 Bro. C. R. 84.

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(4) 315, 3d point, and see the case of Doe dem. Turner *v.* Kett, 4 T. R. 601. A. devised to B. and the heirs of her body, B. died in the life-time of A. A. by a codicil confirmed his will, held that the heir of B. took nothing, although it appeared that A. *knew of the death of B. and of the birth of her son before he made his codicil.*

Section VI.

Of the presumptive Trust in the Executor for the next of Kin of the Testator as to the Surplus undisposed of by the Will.

AN executor, to whom a legacy is given, is generally, by the equitable presumption raised by that circumstance, deprived of the benefit of his legal title; and becomes a trustee of the surplus, undisposed of by the will, for the nearest of kin to the testator; which is a presumptive construction, arising out of the instrument itself, and resting on an implied exclusion from the whole, by a specific gift of part (1).

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(1) A similar question sometimes arises in the case of a devise of real property, where the estate is devised subject to various charges and partial dispositions of the rents and profits, but without any express disposition of the beneficial residue: viz. whether such residue is to remain with the devisee, or to become a resulting trust for the heir at law. This was the point in the late case of King and Denison, 1 Vez. and Beames 260. in which the court, collecting the intention from the whole of the will, construed it a beneficial devise, and not a resulting trust.

His Lordship observed, that the principles applicable to the case were well settled. He adopted those expressed in Hill *v.* the Bishop of London, 1 Atk. 618. as affording the grounds upon which Lord Hardwicke proceeded. The distinction, his Lordship said, upon which the court had gone, was this. If I give to A. and his heirs all my real estate, charged with my debts, this is a devise to him for a particular purpose, but not for that purpose

The question, as to the admissibility of evidence to rebut this presumption, will only properly arise where the legacy to the executor is accompanied by no particular words, denoting in a special manner, the intention of the testator; for there may be cases,

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only. If the devise be upon trust to pay my debts, that is a devise for a particular purpose, and nothing more. The former is a devise of the estate of inheritance, for the purpose of giving the devisee the beneficial interest, subject to a particular purpose; the latter is a devise for a particular purpose, with no intention to give to the devisee the beneficial interest. This, he observed, was the meaning of the several passages in Hill *v.* the Bishop of London, and other cases before Lord Hardwicke, who marked the distinction that the word *trust* was not made use of. That was a circumstance to be attended to, but nothing more. If the whole frame of the will created a trust, for the particular purpose of satisfying which the estate was devised, the law was the same, although the word *trust* was not used.

The case just adverted to turned mainly upon the distinction between a direct trust and a charge, or a devise upon trust and a devise subject to a charge; though in equity these objects are enforced in the same way. And it was considered by the court to be very clear that a devise, after a direction that all the debts should be paid, amounted only to a charge. This, then, was the ground of the decision, though the court gave some weight to the circumstance that the devisees were infants, and that it was difficult to consider an infant as intended to be a trustee; and also to the fact that the heir took a benefit under the will. In general, however, a legacy to the heir has not been considered as sufficient to defeat his title to the real estate undisposed of. See Kellett *v.* Kellett, 1 Ball and Beatty, 543. And where the question was upon the construction, whether the real estate passed under the word *effects* in the residuary clause; and there was nothing positive in the will to shew that real estate was intended to be included in the term; the reversion in fee was held to descend to the heir, although he had a rent-charge devised to him for his life, out of the *same* estate. See Camfield *v.* Gilbert, 3 East, 516.

as Rachfield *v.* Careless (2), wherein the language whereby the legacy is given, may carry the presumption so high as to place it on a level with an explicit declaration, and above all parol proofs to the contrary. Mr. J. Powis, who sat for the Chancellor, in the last-mentioned case, declared his ge-

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(2) 2 P. Wms. 157. in which case a legacy of 5*l.* was given to the executor for his care in fulfilling the will. Vide May *v.* Lewin, 2 P. Wms. 158. n. 1. and the numerous distinctions on this subject in Mr. Coxe's note to Farrington *v.* Knightley, 1 P. Wms. 549. and the cases in the note at the end of Nisbett *v.* Murray; see also Abbott *v.* Abbott, 6 Vez. Jun. 225. and the cases therein cited. From the whole of which it appears, that a legacy will not take away an executor's right to the surplus, unless such legacy is inconsistent with the supposition that he was meant to take the whole. But the executor is always excluded where the words of the will indicate an intention to impose a burthen rather than to confer a benefit, whether there be any legacy given to the executor or not. Urquhart *v.* King, 7 Vez. Jun. 225. Selley *v.* Wood, 10 Vez. Jun. 71. Where an executor had a legacy for his trouble, parol evidence was admitted on behalf of his co-executrix, an infant, to rebut the presumption for the next of kin. Williams *v.* Jones, 10 Vez. Jun. 77. And the Chancellor decreed to the infant the whole residue. In the case of White and Evans, both the executors had legacies, and the legacy to one was for his care and trouble, but no evidence was offered in favour of him whose legacy was not said to be for his care and trouble, 4 Vez. Jun. 21. Unequal legacies given to executors by their own names will not exclude them from the residue, 1 Bro. C. C. 328. and see Griffiths *v.* Hamilton, 12 Vez. Jun. 298. and Rawlins *v.* Jennings, 13 Vez. Jun. 39. A legacy to the next of kin does not exclude such next of kin from his title as such, 10 Vez. Jun. 74.

When a legacy takes away an executor's right to the surplus.

If a testator shews an intention to give *the residue* away from the executors, though the bequest fails the executor is excluded, as where the testator gives it in the manner he shall appoint, and he makes no appointment, or where a blank is left for the residuary devisees, the executors are not entitled. And a general bequest upon trusts, not sufficient to exhaust the whole property, raises a trust for

neral repugnance to admit parol evidence in opposition to this equity for the next of kin, and stated it to have been a *vexata questio,* on which there had been the greatest variety of opinion in all the tribunals in which it had been agitated.

It seems that in the earlier cases, the hesitation in

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the next of kin. If, however, a particular legacy lapses, or is void, it falls to executor where he is entitled to the surplus; for the rule is, that executors take the residue precisely in the same plight as a residuary legatee. Dawson *v.* Clark, 15 Vez. Jun. 409.

It is to be observed, that in the case of Rachfield *v.* Careless, evidence seems to have been admitted in favour of the next of kin, upon which Mr. Coxe remarks, that it appears to be the only case in which parol evidence has been admitted in favour of the next of kin. Nothing, indeed, is more obvious than the distinction between *raising* and *rebutting* a presumption or an equity, for the former of which objects, parol and extrinsic evidence can never, without great violation of principle, be admitted; but the equity ought first to be raised by the presumptive construction of the instrument, to which equity parol evidence may be opposed; and then I conceive it follows upon sound maxims both of law and equity, that parol evidence may likewise be adduced in opposition to this rebutting evidence, and in support of the original presumptive equity. And this, I apprehend, has always been the rule of proceeding; so that the observation of the learned editor just alluded to, must be understood as adverting only to the inadmissibility of parol evidence, in the first instance, and for the purpose of *raising* the equity for the nearest of kin, against the legal title. Indeed, the parol evidence, in the case last-mentioned, for the next of kin, seems to have been superfluous, since the presumption against the executor, from the particular language of the bequest to him, was so strong as to amount to a declaration by the will itself. The last case in the books upon this subject, is the case of Langham *v.* Sandford, 17 Vez. Jun. 435. which agrees with all that has before been said in this note, and though in that case the particular legacy given to the executor was accompanied

Of the distinction between admitting evidence to *raise* and to *rebut* an equity.

admitting parol evidence to repel this trust for the next of kin, arose in a great degree from the doctrine that in courts of equity an executor was not to be considered as any thing more than a trustee (3). But since the case of Foster *v.* Munt[a], an executor has been uniformly regarded as entitled to the whole undisposed of residue, unless there is a violent presumption to the contrary, which, a legacy given to him by the testator, without any disposition of the surplus, was by that case considered as affording.

It would be endless to enumerate the cases upon this subject (4), but it may be useful to observe that — Mr. Justice Buller's observations on the

[a] 1 Vern. 473. 2 Vern. 676.

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by an exception of part of the property which was the subject of it, and which part, not being otherwise disposed of, would have fallen into the residue, and so have defeated the testator's purpose, considering the legacy not as an exclusion, yet such exception was not held to afford any inference in prejudice of the executor. The case was, however, decided against the executor, on account of the weakness of the evidence which was adduced on his side. Upon the whole, it may be stated, that the leaning of courts of equity is strongly against the executor's being excluded by having a particular legacy bequeathed to him; and in the recent case of King *v.* Denison, 1 Vez. and Beames 278. it was observed, by the present Chancellor, that the doctrine had given so little satisfaction that case upon case had occurred paring down its application, until it was not easy to say upon what foundation it stood.

(3) See the case of the Duke of Rutland *v.* the Duchess of Rutland, 2 P. Wms. 212. and the observations of Powis J. in Rachfield *v.* Careless, 1 P. Wms. 548. That an *executor* and administrator having paid all debts, legacies and funeral expences, was compellable to divide among the next of kin, was a proposition in 2 Inst. 33. inadvertently laid down.

(4) In Clennell *v.* Lewthwaite, 4 Vez. Jun. 471. which was

admissibility of parol evidence in these cases.

Mr. J. Buller, sitting for the Chancellor, in the case of Nourse *v.* Finch[b], discovered a sentiment very strong against admitting parol evidence *at all* in such cases, avowing the short period of his authority in that court as his reason for declining an opposition to the series of authorities in the same court, the other way. It appeared also to be the clear opinion of the Judge, that even under these authorities, at most, only that part of the evidence could be admitted, which referred to the time of the making of the will: and he probably would have rejected the evidence offered, on *that* ground, if, under his third view of the case, it had not been clear against the executrix. The force of Mr. J. Buller's objections have been acknowledged by great authorities, since the decision above-mentioned.

Of the general admissibility of parol evidence to repel presumption against the executor.

The decree of the Judge was afterwards confirmed by Lord Chancellor Loughborough, on the insufficiency of the evidence offered. But since the case of Clennel *v.* Lewthwaite[c] in which the reasoning of the Judge in Nourse *v.* Finch, was much under review and ably observed upon, it seems to have been regarded as settled, that parol evidence of all kinds is admissible to rebut the resulting equity for the next of kin arising from any circumstances in a will by implication excluding the executor from the benefit of his legal title: and it seems to be of no importance, as to the mere question of admissibility, whether the mat-

[b] 1 Vez. Jun. 344. [c] 4 Vez. Jun. 471.

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decided above thirteen years ago, it was observed by the Master of the Rolls, that the cases on the question were so numerous, that it was a disgrace to the court.

ters in proof were contemporary with, or subsequent to, the will, although there is admitted to be a great difference in the weight of this testimony, as it refers to a contemporary or subsequent period.

All the cases were then set forth in the order of time in which they were decided, and profoundly commented upon by the late Lord Alvanley, who yielded to the pressure of authorities for admitting the extrinsic evidence in these cases, except where the expressions of the will carried so prevailing an import against the executor, as to amount to a *declaration* of the trust for the next of kin; which, according to the effect given to it in Rachfield *v.* Careless[d], will shut out all access to argument from external circumstances. Finally, in Trimmer *v.* Bayne[e], the doctrine received its full confirmation from the present Chancellor, who declared the sum and sense of all the authorities to be, that all parol *declarations*, whether made *before*, or *at*, or *after* the making of the will, were admissible to *rebut presumptions*, though they are not all alike weighty and efficacious. Whether they consist of conversations with people who have nothing to do with the question, of declarations provoked by impertinent enquiries, or in whatever form they arise, they are *all* evidence, though intitled to very different credit and weight, according to times and circumstances; as will be further explained in the succeeding Section.

[d] 2 P. Wms. 158. [e] 7 Vez. Jun. 518.

SECTION VII.

Testator's Declarations, how far evidence.

IN the case of Druce *v.* Dennison [a], Lord Eldon observed, that formerly the courts were very jealous of admitting evidence of declarations by the testator, except such as were made by him about the time of making the will; and towards the conclusion of his decree in that case, he remarked, that in receiving parol evidence, it gave him great satisfaction to find, that it was contemporary with the will. So in Nourse *v.* Finch [b], Buller J. expressed a stronger opinion against admitting declarations which did not take place at the time of making the will. And the further we go back in tracing this disposition to reject parol evidence of declarations made before or after the will, the more strongly we find it expressed. Thus, Lord Hardwicke observed [c], that the time of making the declarations was very material, and no regard ought to be paid to declarations not made at the time of making the will. Thus, again, in the case of the Duke of Rutland *v.* the Duchess of Rutland [d], it was said by Lord Macclesfield, that allowing parol evidence was exceedingly dangerous, and not to be done in the case of discourses made at a different time from that of making the will. And, again, by Tracy J. [e] it was said, that no regard ought to be paid to expressions before or after the making

Contemporary declarations are most to be attended to.

[a] 6 Vez. Jun. 385. [b] 1 Vez. Jun. 359. [c] 1 Vez. 324.
[d] 2 P. Wms. 215. [e] 2 Vern. 625.

of the will, which possibly might be used by the testator, on purpose to disguise what he was doing, or to keep the family quiet, or for other secret motives or inducements.

The positions of the present Chancellor in Trimmer *v.* Bayne[f] are to be read with discrimination; what he there observes as to the general admissibility of parol declarations, is applicable, and was applied only, to the question, whether an executor being also a legatee in a will is a trustee for the next of kin, or beneficially entitled to the residue undisposed of; which is a question of rebutting an equitable presumption; as has been explained in another place. His Lordship then lays down the affirmative with respect to the general admissibility of parol declarations to repel this presumption of equity in favour of the next of kin, with the following important distinctions, viz. that in the degrees of such evidence, contemporary declarations are clearly of the greatest weight;—next to such contemporary declarations, those which are made *after* the making of the will are the most efficacious, for, a declaration *after* the will as to what the testator had done, is entitled to more credit than one *before* the will as to what he *intended* to do, for that intention may very well be altered; but he *knows* what he *has* done, and is much more likely to speak correctly as to that, than as to what he *proposes* to do.

Declarations made after are more to be regarded than such as were made before the will.

But with these, and perhaps other distinctions, such parol declarations by a testator are all alike admissible—they are to be decided upon by their *weight*—but by their *nature* they are all admissi-

But with different degrees of weight all these declarations are admissible.

[f] 7 Vez. Jun. 517.

ble[s]. The caution, however, with which all declarations by a testator should be admitted, is well pointed out in the same judgment, in Trimmer *v.* Bayne, viz. that these declarations may be made with a view to delude, as being thought a necessary artifice to keep the peace of families: and in the same case it was one of the grounds of the judgment, that the declarations there stated to have been made, and offered as evidence, had an evident purpose of deceiving the person making the inquiry.

[s] Vide Trimmer *v.* Bayne, 7 Vez. Jun. 519.

CHAP. II.

OF THE LAW RELATING TO THE DUTIES OF EXECUTORS AND ADMINISTRATORS.

Section I.

The capacity for the office.—The manner of appointment thereto—The refusal and acceptance thereof—what may be done before probate.

Who may, and who may not, be executor.

A PERSON excommunicated, until absolution[a];—an alien belonging to a country at war with us and residing abroad, or here without the king's licence[b];—persons who from any cause are without common understanding, or who want the common inlets of knowledge[c], are incapable of the office of executor or administrator.

But an infant may be appointed, (though by 38 Geo. 3. c. 87. § 6. he cannot act until he is twenty-one, and an administrator must be substituted in the mean time[d],)

[a] 2 Burn's Eccl. L. 246.
[b] 3 Bac. Ab. 6. Ld. Raym. 282. 6 T. R. 23. 35.
[c] 3 Bac. Ab. 7.
[d] 2 Bl. Com. 503.

and so may a married woman with the consent of her husband[e]; but if she is under twenty-one he shall exercise the office[f].

A foreigner belonging to a country at peace with us[g], a Roman Catholic conforming to the requisites of the 31 Geo. 3. c. 32. and a person outlawed or attainted[h], are also capable of being executors.

Appointment.

The appointment of an executor is grounded on the will, and he may be constructively appointed by any words denoting the testator's intention to invest him with the character.

The office may be qualified either as to the *time* of its taking place, its *duration*, or the *subjects* to which it is to extend; and may be committed to several persons, as co-executors, who are then considered in law as an individual.

Of the renunciation.

An executor must, on being cited, appear before the ordinary, or he becomes liable to excommunication for a contempt. He may then renounce the office by refusing to take the customary oath, or if he be a Quaker the affirmation[i]: but this cannot be done by a mere verbal declaration, for his renunciation must be entered and recorded in the spiritual court before the ordinary[k]; nor after taking the usual oath before the surrogate, for thereby he will have made his election to act; nor after he has once administered. He cannot renounce in part[l]; neither can he assign the of-

[e] 3 Bac. Abr. 9. [f] Off. Ex. 215. [g] 3 Bac. Abr. 6.
[h] Co. Litt. 129. [i] Ld. Raym. 363. [k] Rolls Abr. 907.
[l] 11 Vin. Abr. 139. 1 Salk. 297.

fice to another, but in case of his renunciation administration with the will annexed will be granted to another.

If he renounces in person he must take an oath that he has not intermeddled with the effects of the deceased, and will not intermeddle therewith with a view of defrauding the creditors.

After administration granted he cannot assume the execution during the life of the administrator[k], but after his death he may retract his renunciation, however formally made; and if administration be granted merely in consequence of his non-appearance he has a right at any future time to come in and prove the will[l].

What acts amount to an administration.

The acts which amount to an administration are all such as in law belong to the office of an executor; so that if there be two executors, and one of them has a specific legacy bequeathed to him, and he takes possession of it without the consent of his co-executor, such an act amounts to an administration.

If there be several executors they must all duly renounce before administration with the will annexed can be granted: but if some only renounce, and the rest prove the will, those who renounced may come in at any future time and administer; and if they never acted during the lives, they may assume the execution of the will after the deaths of their co-executors, and

[k] 3 Bac. Ab. 42, 43. [l] Com. Dig. Admon. (B. 4.)

shall be preferred to any executor appointed by them [m].

Derivative executor.

The executor of an executor is to all intents and purposes the executor of the first testator [n], and may be so named in legal proceedings [o], and so on through any number of successive executorships; but if there are two or more original executors, the interest goes only to the executor of the last survivor; and if he renounces, the original executorship will not go to his executor, but administration will be granted [p].

If the executor of an executor intermeddle with the administration of the effects of the first testator he cannot refuse the administration of the effects of the latter, but he may take upon himself the latter, and refuse the former [q].

The authority of executor is from the will, and is vested on the death of testator.

The authority of an executor being derived from the will must be considered as completely vested at the instant of the testator's death. He may, therefore, before proving the will, do all that which an executor after probate may do, except that, although he may commence actions in right of the testator, yet he cannot declare; since in order to maintain his claim in a court of law, he must produce the probate; but when produced, it shall be considered as relating back to the time of suing out the writ [r]. He may also arrest a debtor to the estate, and shall be justified in that act

[m] 1 Vin. Abr. 88. [n] 2 Bl. Com. 506. Plowd. 525.
[o] 1 Leon. 275.
[p] 1 Salk. 307. 311. 11 Vin. Abr. 68, 69. 114.
[q] Shep. Touchst. 464.
[r] 11 Vin. Abr. 202. Harg. Co. Litt. 292. b.

by this relation of the probate[s]. But such relation shall not prejudice a third person; and therefore when the debtor after being arrested by the executor before probate paid a debt to another creditor, and continued two months in prison, he was adjudged not to be a bankrupt from the time of the arrest so as to invalidate that payment[t]. Relation of the probate.

He may also before probate maintain actions on his own actual or constructive possession, as trespass, detinue, replevin and trover for goods or cattle of the testator taken or converted after the testator's death[u]

Again, supposing him to have intermeddled, he may be sued at law by the creditors of the testator; as the law will not suffer him by his delay to impede the rights of those, to whom by his interference he has made himself responsible[w].

If he dies before probate he is considered in law as intestate in regard to the executorship[x]; although he may have made a will and appointed executors, and although he die *after* taking the oath, if *before* the passing of the grant. Where he dies before probate.

If A. be executor for a certain period, and B. nominated for the time subsequent, and A. prove the will, after that time has expired, B. may sue without another probate[y]

[s] Roll. Abr. 917. [t] 11 Vin. Abr. 204. 3 Bac. Abr. 53.
[w] 11 Vin. Abr. 203.
[x] Plowd. Com. 280. b. 11 Vin. Abr. 205. 2 Vern. 49.
[y] 11 Vin. Abr. 68. 90.
[s] Ca. Ch. 265. 11 Vin. Abr. 56.

SECTION II.

Of the Probate, Bona notabilia, and in general of evidence of wills in all courts.

Of the different methods of proving the will.

THE proof of wills in the ecclesiastical court may be, as we have already shewn[a], either in the common or in the solemn form. For the first method of proof nothing is requisite but that the executor should present the will before the judge, without any citation of the parties interested, deposing that it is the true and last will of the testator, upon which the will passes, and is allowed. But the proof in form of law, or in the solemn form, is, when the will is brought before the judge in the presence of the parties interested, who are cited to attend, and is subjected to a full examination before it is finally allowed.

Where the common form only has been pursued, the will is open to be disputed before the ecclesiastical judge at any time within 30 years; but where the more formal method has been adopted, the will cannot be disputed after the time limited for appeals has elapsed[b].

When a will is proved in either of the before-mentioned forms, the original is deposited in the registry of the ordinary or metropolitan, and a copy in parchment is made out under his seal, and delivered to the executor, together with a certificate of its having been

[a] Vide sup. 1 Vol. 169. Where this subject is more fully considered.

[b] 3 Bac. Abr. 40.

proved before him. And these documents together constitute the probate.

In general, probate can only be granted in the court of the ordinary or metropolitan, but it may be granted by courts baron if they can found a claim to such privilege upon prescription, and have exercised it from time immemorial[c]. So also in some boroughs the probate of the wills of the burgesses may belong to the mayor by custom in respect to lands devisable within such boroughs; though still as to personal property the will must be proved before the ordinary[d].

In common cases, if at the time of the testator's death his property be all comprised within one diocese, the executor ought to prove his will before the bishop of that diocese, or his surrogate.

BONA NOTABILIA are goods to the amount of 5*l*. except where the amount is varied by particular custom, as in London where they must amount to 10*l*[e]. and debts owing to the testator are bona notabilia as well as goods in possession[f]. If there are bona notabilia of the testator in two distinct dioceses, or in several peculiars within the same province, the will must be proved before the metropolitan[g]. If there are bona notabilia in several provinces, probate shall belong to the archbishop in each province in respect to the bona notabilia lying within his own province[h]; but if they lie partly in different dioceses of one province, and partly in one diocese only of the other; in Bona notabilia.

[c] Salk. 41. Cowp. 286. [d] 3 Bac. Abr. 40.
[e] 3 Bac. Abr. 37. [f] 1 Roll. Abr. 909.
[g] 2 Bl. Com. 509. 4 Burn's Eccl. Law, 234.
[h] 3 Bac. Abr. 36. 1 Salk. 39. 11 Vin. Abr. 76.

respect of the former, the archbishop shall have the probate; in respect to the latter the particular bishop[i]. If a man dies possessed of goods in London and Dublin, it seems that the grant of administration to the goods in London belongs to the archbishop of Canterbury, and of the goods in Dublin to the archbishop of Dublin[k]. If the death happen in one diocese, and all the effects are in another diocese, provided they amount to 5*l.* the archbishop shall have the probate[l]. But the goods which a man has with him, while on a journey, do not constitute bona notabilia in the place where they happen to be[m].

Where a testator dies possessed of goods in the diocese of an archbishop, and in a peculiar of the same diocese, there must be separate probates for them respectively[n].

Probate always belongs to the archbishop if the party dies beyond sea, though he leaves goods in one diocese only[o]. And the probate of every bishop's testament, or granting administration of his goods, although he has no goods but within his own diocese, belongs to the archbishop[p].

If the probate be granted by a bishop or inferior judge when it does not belong to him it is *void;* but if it be granted by the metropolitan when it does not belong to him, it is only *voidable,* and is of force until reversed by sentence[q].

[i] Off. Ex. 48. [k] Gibs. 472. [l] 11 Vin. Abr. 80.

[m] Off. Ex. 45.

[n] 4 Burn's Ecc. L. 232. 1 Bl. Com. 380.

[o] 3 Bac. Abr. 36. Roll. Abr. 236. [p] 4 Inst. 335.

[q] 4 Burn. Eccl. L. 193. 11 Vern. Abr. 75. 80. Gibs. 472.

Whatever may be the amount of the testator's effects in the diocese in which he dies, unless he leaves in another diocese goods to the value of 5*l.* they will not be bona notabilia [r], though if there are goods in two other dioceses amounting to 5*l.* in the whole they shall be bona notabilia and give the archbishop the probate [s].

A lease or term for years, if of the value of 5*l.* is bona notabilia where the lands lie [t]; and debts [u] due to the deceased of that amount, however desperate, are also bona notabilia; but if there be a bond in the penalty of 5*l.* for the payment of a less sum though forfeited, it shall not be considered as bona notabilia [x].

Debts by specialty are bona notabilia in that diocese where the securities were, and not where the testator lived, at the time of the testator's death [y]; but debts by simple contract follow the person of the debtor, and are therefore bona notabilia in the diocese where the debtor resided at the time of the creditor's death [z]. Thus a judgment obtained in one of the Courts of Westminster, makes bona notabilia where the record is. But a debt on a bill of exchange follows the person of the debtor [a].

Penalty on acting without

An executor incurs a penalty of 50*l.* under the Stat. 37 Geo. III. c. 90. s. 10. if he acts but neglects

[r] 3 Bac. Ab. 37.
[s] 4 Burn's Ecc. L. 232. 1 Roll. Abr. 908, 909.
[t] 3 Bac. Ab. 37. [u] 3 Bac. Ab. 47.
[x] Off. Ex. 46. [y] 3 Bac. Ab. 37. Shep. Touchst. 463.
[z] Dyer 305. in note. 11 Vin. Ab. 80.
[a] 3 Salk. 164. Ld. Raym. 854. 11 Vin. Ab. 77. 80.

taking out probate for six months. to take out probate within six months after the death of the testator[b]; nevertheless, if he accepts the office, he is still entitled to the probate; and upon the Ordinary's refusal may have a writ of mandamus to compel him to grant it[c]. But the Bishop may return to the writ the pendency of a suit before him in respect to the will[d].

An executor cannot have probate till 21.

Before the statute 38 Geo. III. c. 87. an infant of the age of seventeen was capable of taking out probate, and consequently of maintaining an action as executor, though during his minority he must have sued by guardian or prochein amy; but by this statute he cannot have probate till he attains the age of twenty-one, and is by consequence restrained from bringing an action till that period.

Where there are several executors, probate may be granted to one with a reservation for the rest.

Where there are several executors one may take out probate with a reservation for the rest, who may afterwards apply for the probate which will be granted to the person applying, annexed to an engrossment of the original will[e]; but if they all apply together, one probate is sufficient[f]. A probate may be commensurate with the will, and limited to the specific effects to which the will extends, and an administration may be granted with respect to the rest of his property.

Where there is both real and personal property probate must be of the entire will.

No probate ought to be granted of wills concerning lands only; but where there is both real and personal property. there must be an entire probate[g]. On which subject the law was distinctly laid down by

[b] 11 Vin. Ab. 205.
[c] 4 Burn's Eccl. L. 244. [d] Ld. Raym. 262. Burr. 2295.
[e] 4 Burn's Eccl. L. 244. [f] 3 Bac. Ab. 30.
[g] 11 Vin. Ab. 57. 60. 117. 2 Salk. 552. 3 Salk. 22.

Berkeley J. in the case of Netter *v.* Percival Brett[h], who there said, that "he would insist upon two rules, first, that the probate of testaments for personal things appertains only and properly to the spiritual court: and for the probate of such testaments no prohibition lies. Secondly, that the probate of testaments concerning lands only, and no goods contained therein, ought not to be proved in the spiritual court by compulsion, although they *may* be proved there: and if there be a suit to compel any to prove such testaments in the spiritual court, a prohibition lies. Then when a will is concerning lands and goods, and is one entire will, it must be proved entirely in the spiritual court. And the probate of the will for the land will not prejudice the heir, for it shall not be evidence at the common law; nor shall the examinations of the witnesses there examined be given in evidence at the common law."

If a will containing personal bequests, comprise also a disposition of land to the value of 100,000*l.* the ecclesiastical court may cite the parties to bring in the original to be proved per testes, and the Court of King's Bench ought not to prohibit them[i].

Where the absence of a testator has been so long as to ground a reasonable presumption of his death, the executor is permitted to prove, on swearing that he believes him to be dead[k]. And where it happens that the executor cannot be found, temporary administration may be granted[l].

[h] Cro. Car. 395. and see the contrary determination in Cro. Jac. 346. denied by Lord Holt in Hudson *v.* Fisher, Cas. Temp. Holt. 180.

[i] Skinn. 174. [k] Swinb. part 6. J. B.

[l] Roll. Ab. 907.

If a will be made in a foreign country disposing of goods in England, it must be proved here[m]; but if the effects were all abroad, and the will be proved according to the custom of the country where the testator died, it is sufficient, and the executor may plead such matter to a bill filed against him by the administrator for an account of the personal estate of the deceased[n].

In order to prevent probate, a caveat must be entered in the ecclesiastical court, which will be effective during three months.

The probate is conclusive evidence as to the will itself. But the legal existence of the probate itself may be controverted.

The spiritual court will revoke (1) the probate of a will, if it can be proved that it has been fraudulently obtained, or that the will itself had been revoked[o]; but before probate is revoked, the court will not grant a new one[p]. When properly granted it authenticates the right of the executor, and relates to the time of the testator's death[q]. And as long as it remains unrevoked it cannot be contradicted, but must be received as conclusive, in the temporal courts[r]. Thus against the seal of the ordinary no evidence will be admitted to prove the will forged or fraudulently obtained, or the testator non compos, or that another

[m] 11 Vin. Abr. 58.
[n] 11 Vin. Abr. 59, 69. 1 Vern. 397.
[o] Off. Ex. 48. [p] 7 Mod. 146.
[q] 11 Vin. Abr. 205. [r] 1 Ld. Raym. 262.

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(1) Where the issue is whether a will made of lands and goods is revoked, it is properly triable at common law; but if the question be whether a will of goods only be revoked, it is properly triable in the spiritual court. See Denn's case, Cro. Car. 114.

person was executor, which points belong exclusively to the ecclesiastical jurisdiction, but that the *seal itself* was forged, or that there were bona notabilia, may be shewn by evidence; as by such evidence the authenticating effect of the seal is not disputed, supposing it to have been duly obtained, but the legal existence of the probate itself is controverted[s]. The probate is properly to be considered as in the nature of a *sentence* of the ecclesiastical court, and this is the true reason of its being held conclusive as to the will of the executor[t]. And it is conclusive in courts of equity as well as in courts of law. Even a foreign probate where the testator died abroad, and his personal estate was wholly in the foreign country, may be pleaded to a bill claiming on the ground of intestacy[u], as we have already stated.

Of wills of land the validity is entirely a matter for the cognizance of the ordinary courts of law. (2) But where a particular clause, and not the whole of a will, Questions affecting the validity of wills are

[s] Strange 671.
[t] Allen *v.* Dundas, 3 T. R. 125. 12 Vez. Jun. 298. 307. 1 Vern. 397. [u] 1 Vern. 397.

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(2) It has long been settled, that a court of equity will not set a will aside, upon a suggestion of fraud in obtaining it. In Bennet *v.* Vade and others, 2 Atk. 324. this was said to have been settled ever since the case of Powis *v.* Andrews, 3 Bro. P. C. 476. on the ground that a will of personal estate may be set aside in the ecclesiastical court, and of real estate in a court of law for fraud. If the testator be imposed upon in making his will, then it is not his will, and that is a question of fact, and proper to be tried upon an issue of *devisavit vel non* in a court of common law, if the will relates to real estate. And see the difference between a will and a deed in this respect, in James *v.* Greaves, 2 P. Wms. 270.

proper for legal cognizance.

has been impeached on the ground of fraud; or if the fraud has consisted in obtaining the consent of the next of kin to the probate, courts of equity have laid hold of these circumstances to declare an executor a trustee for the person injured by fraud [x].

Of the peculiar relief which equity affords.

But although equity refuses to interfere in a direct manner to set wills aside for fraud in making or obtaining them, it will take from a person all benefit under a will to which he has fraudulently entitled himself, and will compel the performance of all promises and assurances upon the faith of which any such benefit has been procured. For the sake therefore of baffling all such base projects, courts of equity will lay hold on the conscience of the deluder, and make him a trustee for the party injured by the breach of confidence: which is a method of relief peculiar to these courts, and by which the legal effect of instruments is saved from disturbance, and private justice is done without breaking in upon the rules or the province of the common or ecclesiastical law. So if by false representations or assurances a person intending to make a will, or to insert a particular bequest or provision, is induced to leave such intention unexecuted, equity will bind the conscience of the imposing party, and through the medium of a trust compel a specific performance. Thus in Chamberlain's case [y], where an eldest son, his father being about to make his will, and thereby to make certain provisions for his younger children, persuaded him not to make any such will, for that he would take care his brothers and sisters should have such provisions, they were decreed in Chancery to be made good by the heir.

[x] Strange 666. [y] Prec. in Ch. 4.

So, if a man, having made his will, and his son executor, had said, when he was dying, that he had a mind to leave his wife executrix, and the son had said, "Dont trouble yourself to alter the will, for I will let her have the surplus and act as executrix," the court of Chancery would decree it accordingly [z]. It is proper, however, to apprize the Reader, that he will meet with many cases in which the equitable relief in matters of fraud has been carried to the extent of setting wills aside for fraud in a direct manner [a]. But since these cases we have Lord Hardwicke's clear and decisive opinion that the law is settled as is above stated. (3)

Payment to an executor who has got probate of a forged will discharges the debtor.

Since a probate is conclusive until it is repealed, and a court of common law cannot receive evidence to impeach it, it has been determined that payment of money to an executor who has obtained probate of a forged will is a discharge to the debtor of the deceased though the probate should be afterwards revoked [b], but payment of money under probate of a supposed will of a living person is void, because in such case the ecclesiastical court has no jurisdiction, and the probate can have no effect.

[z] Gilb. Eq. Rep. 11.

[a] Welby v. Thornaugh, Prec. in Ch. 123. Herbert v. Lounder, 1 Ch. Ca. 22. Maundy v. Maundy, id. 123. Goss v. Tracy, 1 P. Wms. and Farrington v. Knightley, 1 Ed. 518.

[b] Allen v. Dundas, 3 T. Rep. 125.

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(3) Mr. Powell has attempted a distinction by way of reconciling these cases, in which there is more subtilty than precision. Pow. de Dev. 696.

It is also holden, that pending a suit in the spiritual court respecting the validity of a will, an indictment for forging it ought not to be tried, and it is the practice to postpone the trial till that court has given sentence[c].

Probate no evidence of a devise of real estate.

The probate of a will in the spiritual court is no evidence of a devise of real estate[d]: it is no proof of the contents of the will in respect to that description of property, even though the original will is lost. Nor is it receivable as evidence when it is offered not to establish a devise, but for the purpose of proving a pedigree or relationship only[e]. Thus, says Mr. J. Buller[f], where a person would prove the relation of a father and son by his father's will, he must have the original will and not the probate only, for where the original is in being, the copy is no evidence; besides the seal of the court does not prove it a true copy unless the suit only related to personal estate. But the ledger book, continues the same authority, is evidence in such a case, because this is not considered merely as a copy, but is a roll of the court; and though the law does not allow these rolls to prove a devise of lands, yet when the will is only to prove a relation, the rolls of the spiritual court which has authority to enrol all wills, are sufficient proof of such testament. And under particular circumstances, the ledger book may be evidence even of a devise of real estate; as where, in an avowry for a rent-charge, the avowant

[c] 3 Bac. Abr. 34. 1 Stra. 481. 703. 3 T. R. 126. see also Eq. Ca. 207, 208. Palm. 163.

[d] Bull. N. P. 245.

[e] 1 Lord Raym. 732. Doe dem Ash *v.* Calvert, 2 Campb. 389.

[f] N. P. 246.

could not produce the will under which he claimed, as it belonged to the devisee of the land, but produced the ordinary's register of the will, and proved former payments, it was holden to be sufficient evidence against the plaintiff, who was devisee of the land charged.

But it has often been holden that a copy of the ledger book is not evidence; yet, since the original would be read as a roll of the court without further attestation, it seems fit the copy should be read. The contrary practice has been founded upon the mistake, that the ledger book is read as a copy, so that the copy of that is but the copy of a copy; whereas the ledger book is read as the roll of the court. The ledger book, or a copy, seems to be evidence as to personal estate.

But the law will not allow these rolls or registers to prove a devise of land, when the claim is by the operation of the will itself, for to that purpose the ecclesiastical courts have no power to authenticate wills. Neither will an exemplification under the great seal be evidence of a will in a trial at law[g]. But where the will can be had, the will itself must be produced to substantiate a title to lands under it. Therefore, where in evidence to a jury at bar in ejectment, the defendant made title as a purchaser under a devisee, and shewed only a bill in Chancery preferred by the heir, under whom the lessor of the plaintiff claimed, against the devisee, wherein the will was set forth, and also the answer in which it was confessed; it was held by Keeling and Moreton Justices, (Twysden *contra*) that this was no evidence, though they proved possession according to the devise; and that this had But not as to land.

[g] Comb. 46.

been confessed by the plaintiff in former trials; because the will itself was the best evidence of its own existence.

But where the original will can be proved to be lost, the probate even of a will of lands may be evidence.

But where the original will can be proved to have been lost, the probate even of a will of lands was considered by Lord Holt as good evidence [h]. Thus where it appeared upon evidence in ejectment, that a will was made of the lands in question in 1647, which will was lost, but mention was made of it in the calendar (which is the index of the register in the spiritual court,) and also in the seal book, and that a commission issued in April 1748 to examine the executors upon oath, &c. which being returned, probate had been granted in May 1648, and the probate was produced in evidence, Holt C. J. allowed it at the assizes to be good proof of the will, but reserved it for further consideration; afterwards, however, as well in the King's Bench as at Nisi Prius upon other trials, he declared himself to hold to his first opinion.

As it seems that where a will remains in Chancery by order of the court, or wherever a will is lodged in a court that has jurisdiction over the subject-matter of it, the copy becomes evidence, upon the principle that the will has thereby become a roll of the court, and might itself be read without further attestation, and so by consequence a copy of it ought to be permitted to be read [i].

The copy of the probate, (but not a copy of the original will [k]) is unquestionable evidence where the

[h] St. Segar v. Adams, 1 Lord Raym. 731.
[i] Gilb. L. of Ev. 74. [k] Bull. N. P. 246.

will is of chattels, or as far as it regards chattels only, for to this purpose the probate is an original document taken by authority, and of a public nature[l].

Where the probate is lost an exemplification is given out.

Where the probate is lost, the spiritual court does not grant a second probate, but gives out an exemplification of it from the record of the court, and such exemplification will be evidence of the proof of the will[m].

Of the revocation of the probate

To prove the fact of the revocation of a probate, an entry of the revocation in a book of the prerogative court, in which all causes were entered by the register, and which was kept as the only record of such proceedings, and of the decree of the court, has been admitted as sufficient evidence[n].

In case of a revocation of probate all the intermediate acts of an executor are void, and this revocation may be procured either by suit or on appeal in the ecclesiastical court; but equity has allowed payments either of debts or legacies made by an executor under a revoked will without notice of the revocation[o].

[l] 3 Salk. 154. [m] Shepherd *v.* Shorthouse, 1 Strange, 412.
[n] Ramsbottom's case, 1 Leach, Cr. Ca. 30. note (c).
[o] 3 Bac. Abr. 50. 1 Cha. Ca. 126.

SECTION III.

Of the Letters or Grant of Administration.

WHEN a person dies without a will he is said to die intestate, in which case the stat. 31 Edward III. c. 11. provides that the ordinary shall depute the nearest and most lawful friends of the deceased to administer his goods; and they are thereby put on the same footing in regard to suits, and to accounting, as executors appointed by the will.

The stat. 21 Hen. VIII. c. 5. empowers the ordinary to grant administration either to the widow or next of kin, or to both of them, at his discretion, and to elect whom he pleases of two or more persons in the same degree of kindred.

Of the husband's right to administration.

Courts of law in the interpretation of the word 'friends,' in the statute of Edward, have given the first place to the husband, but his right may be controlled by circumstances[a]: as where a husband parts with all his interest in his wife's fortune. But when a feme covert has power to dispose by will of a part of her property, and appoints an executor for that purpose, letters of administration will be granted to the husband for the rest[b].

Wife and next of kin.

Again the ordinary is to grant administration of

[a] 3 Bac. Abr. 55. in not. Com. Dig. Admor. B. 6.

[b] 4 Burn. Ecc. L. 232. Stra. 891.

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the effects of the husband to the widow or next of kin, but he may grant it to either or both at his discretion [c].

If the widow renounce administration it shall be granted to the children, or other next of kin of the intestate, in preference to creditors. The ordinary may also grant administration of part to the wife and of part to the next of kin [d].

Of the degrees of kindred.

Consanguinity [e] or kindred is the connexion of persons who are descended from the same common ancestor, and may be either lineal or collateral. Lineal consanguinity is that which subsists between persons, one of whom is descended from the other in a direct line, as between a man and his father, grandfather, &c. ascending, and his son, grandson, &c. descending. Every generation in this kind of consanguinity constitutes a different degree. Thus a man is related to his father and his sons in the first degree, to his grandfather and grandson in the second degree, and so on.

Collateral relationship agrees with lineal, in that the parties are descended from the same common ancestor; but differs, inasmuch as they are not descended one from the other: thus, brothers, cousins, uncles and nephews, are of course collaterally related.

The mode of calculating the degrees of relationship is by counting upwards from one of the parties to the common ancestor, and from the common an-

[c] 11 Vin. Abr. 92. Str. 552.
[d] 11 Vin. Abr. 71. 3 Bac. Abr. 55. 1 Salk. 38.
[e] 2 Bl. Com. 202.

cestor down again to the other party, reckoning one degree for each person [f].

Of these kindred those are to be preferred who are most nearly related. Of the next of kin, first the children, or if there be none of them, the father, or, if he be dead, the mother, is entitled to administration. Then follow in order, brothers whether of the whole or half blood, grandfathers, uncles or nephews; and in the last place cousins, and the females of each class in the same order [g].

Relations by the father's and mother's side are equally entitled, provided they are in equal degrees of kindred.

A married woman who is entitled, cannot obtain administration without the permission of her husband, because he must enter into the administration bond, unless it can be shewn by affidavit that he is abroad, or otherwise incompetent, in which case a stranger may join in the security; but in either case the administration is granted to her alone [h].

Where a married woman, a minor, is next of kin.

If a married woman who is not of age be the next of kin, she may chuse her husband to be her guardian to take the administration for her use and benefit during her minority; and on her coming of age a new administration may be granted to her.

There are certain legal disqualifications which may prevent a person from being an administrator, besides

[f] 2 Bl. Com. 207. [g] 2. Bl. Com. 505.

[h] 11 Vin. Abr. 85. 4 Burn's Ecc. L. 241.

those which would disable him from acting as an executor; as being attainted of treason or felony, outlawry, imprisonment, absence beyond sea; but an alien, who might have been an executor, may be an administrator[i].

No person can properly act as an administrator until letters of administration are granted to him; but if he omits taking out letters of administration within six months from the time he administers, he incurs by statute 37 Geo. III. c. 90. § 10. a penalty of 50*l*.

Letters of administration, unless in particular cases (as where the effects left are of a perishable nature, in which case the judge may decree them sooner,) do not issue until fourteen days after the decease of the intestate[k].

What a person must do in taking out letters.

When a person applies for letters of administration, he must swear that as far as he knows and believes the deceased made no will, and that he will truly administer the goods, chattels, and credits, by paying the deceased's debts as far as the property will extend, and that he will make a true and perfect inventory of all the goods, chattels and credits, and exhibit the same into the registry of the spiritual court at the time assigned him by that court, and render a just account of his administration when lawfully required. He must also, pursuant to the 21 Hen. VIII. c. 5. and 22 and 23 Car. II. c. 10. enter into a bond with two or more sureties conditioned for the performance of those duties.

[i] 9 Co. 39 b. 4 Burn's Ecc. L. 233. [k] 4 Burn's Ecc. L. 242.

An administration once committed to one of the next of kin excludes others, though equally related to the deceased, the maxim being "qui prior est tempore potior est jure[l]."

SECTION IV.

Of particular and supplementary Administrations, and such as are granted on the death of an Executor or Administrator intestate.

Of administration with the will annexed.

IF no executor be named in a will[a], or one be named who dies in the life-time of the testator, or if he be incompetent to execute the office, or refuses to act, administration with the will annexed must be granted; though, if he subsequently becomes competent, such administration is no longer of force.

But in such cases administration will generally be granted to the residuary legatee if there be any, (even if it is uncertain whether there will be a residue,) rather than to the next of kin[b].

Of administration during the infancy of the executor or executors.

If the executor be a minor, administration must be granted until he comes of age (which by stat. 38 Geo. III. c. 87. is not until he is 21 years old); and if there be several executors, and all under age,

[l] 11 Vin. Ab. 116. 1 Vent. 218.

[a] 11 Vin. Ab. 69. 2 Bl. Com. 503.

[b] 11 Vin. Ab. 90. 91.

he who first attains the age of 21 years may prove the will, and the administration will cease[c]. But the administration does not cease on the marriage of an infant executrix with a husband of full age. If one of the executors be of age, and the other a minor, he who is of age has the execution of the will[d].

There is also another administration of this temporary kind which is granted during the absence of the executor, or next of kin; which lasts only till the executor or next of kin, respectively appear, and qualify themselves[e].

During the pendency of a suit.

Another sort of administration is that which is granted while a suit is depending either with respect to the will or the administration, which is called an administration "*pendente lite.*"

When all the next of kin refuse.

When the next of kin cannot receive any benefit from the estate, and refuse the grant, the course is for the ordinary to issue a citation for the next of kin in special, and all others in general, to accept or refuse letters of administration, or shew cause why the same should not be granted to a creditor[f]; and if several creditors apply for administration, though the court may prefer one of them; yet upon petition of the rest, it will compel him to enter into articles to pay debts of equal degree in equal proportions, without any preference of his own.

Administration by a creditor.

Where administration will be granted to the attor-

The ecclesiastical court will grant administration to the attorney of the executor, or of all the executors, or of all the next of kin, if they do not reside within

[c] 4 Burn's Ecc. L. 240.
[d] 4 Burn's Ecc. L. 240. 11 Vin. Ab. 99. 1 Mod. 47.
[e] Roll. Abr. 907. [f] 4 Burn's Ecc. L. 230. 2 Bl. Com. 505.

ney of the parties entitled. the province, and if the effects are under 20*l.* such administration will be granted whether they are resident or not within the province. But an administration granted by a foreign court will not be taken notice of in an English court of justice, in respect to property situated here. Therefore, if a will be made in a foreign country, disposing of goods in England, such will must be proved here[g]. But it is otherwise if the effects are all abroad, and the will is proved according to the custom of the country where they happen to be.

Where the executor resides out of the jurisdiction of the king's courts. By 38 Geo. III. c. 87. After the expiration of twelve months from the testator's death, if the executor, to whom probate has been granted, is residing out of the jurisdiction of his Majesty's courts, on application of any creditor next of kin, or legatee grounded on affidavits in the form therein specified, stating the nature of the demand, and the absence of the executor, administration shall be granted.

Of a limited administration. A special administration may be taken out, limited to a particular chattel. And this is sometimes of great importance to be done for the sake of obtaining an assignment of a term of years, to protect the inheritance of a purchased estate.

If an administrator be outlawed or imprisoned beyond sea, administration may be committed to another; but only while the incapacity lasts.

Where a bastard dies intestate. If a person who has no kindred, or a bastard who can have none legally, dies intestate, the king as *ulti-*

[g] 11 Vin. Abr. 58.

mus hæres, is intitled to his property[h]: but in such case it is the practice to transfer the royal claim from the crown to the nearest connexion of the party to whom the ordinary of course grants letters of administration, with a reservation, as it is said, of a tenth or other small proportion of the property.

When there are two administrators, and one of them dies, the survivor is sole administrator[i]. If a sole administrator die, a new one must be appointed by the ordinary.

Where the person entitled to administer for his own sole benefit dies before taking out administration.

If a person dies intestate, leaving a father or other person who will be entitled to the administration entirely for their own sakes, being solely interested in the property, and not for the purpose of distributing the effects to others equally entitled, and such father or other person die before taking out letters of administration, his representative, and not the representative of the deceased will be entitled to the administration[k]. But in the case of a husband it has been settled that the court is bound by the statute 31 Ed. III. c. 11. to grant administration to the next of kin of the wife who shall be a trustee in equity for the husband's representatives[l].

Of the administration de bonis non.

Where an executor or administrator after probate or letters of administration dies, without having fully administered, a fresh administration is granted of the

[h] 3 P. Wms. 33. 1 Woodes. 398.
[i] Ca. Temp. Talb. 127. 4 Burn's Ecc. L. 241.
[k] 11 Vin. Ab. 88. fol. 25. 1 P. Wms. 381.
[l] 3 Atk. 526. 4 Burn's Ecc. L. 235, 1 Vez. 16. 1 Wils. 169.

goods unadministered, called an administration *de bonis non* [m].

Where an executor, also residuary legatee, dies before he has fully administered.

If an executor be also residuary legatee and die, (whether before or after probate) intestate, administration with the will of the first testator annexed shall be granted to the administrator of such executor, or if he made a will his executor will be entitled to such administration [n].

Where a feme covert executrix and residuary legatee dies intestate.

If a feme covert be executrix, and also residuary legatee, and die intestate, the husband will be entitled to administer to the testator [o].

Where a surviving executor renounces.

If a surviving executor renounces, administration is granted to the next of kin of the testator, and not to the representative of the deceased executor, even though he proved the will and acted [p].

Where administration improperly granted is void, and where only voidable.

In cases where administration has been improperly granted, it is sometimes *void*, and sometimes only *voidable*. It is void if granted in derogation of the right of an executor; as where one has been named, and the will has been suppressed, or its existence unknown [q], or before the refusal of the executor, or a fresh refusal of a surviving executor who refused in the life-time of his co-executor, or without competent authority. But where it is granted in derogation of the right of kindred according to the degrees of affinity, as to one not next of kin, or to one next of kin jointly with one not of kin, or to a creditor be-

[m] 11 Vin. Ab. 111.

[n] 11 Vin. Ab. 88. 92. Com. Dig. Admor. (B. 6.)

[o] 11 Vin. Ab. 89. 91. [p] 11 Vin. Ab. 90. 108. [q] Plow. 279.

fore the renunciation of the next of kin, in these cases it is avoidable only by the act of the Spiritual Court. It is subject also to be repealed when granted to the next of kin instead of the residuary legatee, and that even though there be no actual residue[r], or if granted to the next of kin of a feme covert instead of her husband[s].

But there are some cases in which, though an administration may be said to have been granted with some degree of irregularity, (as when among the kindred of the same degree administration is granted to the younger instead of the elder, or the female instead of the male, or to a creditor for a less instead of one for a larger amount), yet it does not seem to be within the competency of the Spiritual Court to revoke or repeal the grant[t]; nor is the abuse of the letters of administration a sufficient ground for repeal, as the ordinary ought to have taken sufficient caution in the first instance[u]. If after an administration be granted, a second be issued, and afterwards the first is repealed, the second shall stand[v]. In all cases the question of fact as to the next of kin is exclusively a matter of spiritual cognizance[x].

It is plain that wherever the administration is void, and not merely voidable, the acts done under the administration will be of no validity; for the administration was void ab initio. So also where the administration is only voidable if it be reversed upon an appeal[y]. But all lawful acts of the first administration shall stand good, if it is only countermanded or

[r] Vent. 219. [s] 11 Vin. Ab. 92. [t] 11 Vin. Ab. 100. 116.
[u] 11 Vin. Ab. 115. 1 Vent. 219. [v] Com. Dig. Admor. (B 3.)
[x] 11 Vin. Ab. 92. 115. [y] 11 Vin. Ab. 117. 3 T. Rep. 129.

revoked upon suit by citation; and it is always sufficient if a debt is *bona fide* paid to the visible administrator [a]. The debts, funeral expences, and legacies paid by an administrator, shall be allowed to be deducted in the damages recovered against him on the subsequent appearance of an executor.

SECTION V.

Of the power and interest of an Executor or Administrator in respect to the Testator's property.

Difference between an executor's own property, and that which is his as executor, in respect to the consequences of his legal acts, and situations.

THE law makes a cautious and salutary distinction between the property to which an executor or administrator is entitled in his own right, and that which he possesses in his official capacity. His own property, therefore, is all that will pass by a general grant, nor are the testator's effects liable to be taken in execution for the debts of his executor or administrator, or to be passed by the commissioners' assignment in case of his bankruptcy, or to be transferred by the marriage of the executrix.

Of terms of years, and leases.

Chattels real are such as partake of real estate, that is to say, such interests as are issuing out of, or annexed to, real estates, as terms for years though determinable on lives, and reversionary interests in such terms, next presentations to churches, estates by elegit, &c. These vest in the executor, and are distributable by him as assets of the testator; and if a

[a] Allen v. Dund.s, 3 T. Rep. 125.

lease is renewed by an executor, the new lease shall stand in the place of the old one as assets[a]. An executor cannot waive a term of years of which his testator died in possession, though it be of no value, without a total renunciation of the executorship, unless he has not assets sufficient to pay the rent, in which case on giving notice to the lessor he may throw up the lease[b]. And though a term be merged in the executor by the accession of the inheritance, yet it will be *in esse* as to creditors and legatees[c].

Though all chattel interests vest in the personal representative, yet where such chattels partake of the nature of real property, as leases for years, the law does not regard the executor as being fully possessed of them until he has entered: but where they are of such a nature as not to admit of actual entry, as is the case with all incorporeal hereditaments, the executor has an immediate possession by construction[d].

Things of a personal nature pass to the personal representative, unless in certain excepted cases. Things animate, where they are of the tame kind, and likewise such as are naturally wild, provided they have been rendered tame by art, or kept in a confined state, belong to the executor; but animals, wild by nature, which are not so confined, or escape from their confinement and regain their natural liberty, are not considered as property, and therefore of course are not transmissible, except where they are in the habit of going loose and returning, or have a mark or collar upon them to denote the property in them. Of personal things.

[a] 3 Bac. Abr. 58.

[b] Ld. Raym. 554. 5 Rep. 30. Hargrave's case. 1 Salk. 297. Off. Exec. 120.

[c] 11 Vin. Abr. 129. [d] 11 Vin. Abr. 240.

Fruit, grass, corn, and manure.

Many things affixed to or growing upon the freehold, and which, while so circumstanced, are part of the freehold property, become personal by separation from the freehold, as fruit gathered, or the plants and trees themselves, or their branches when felled or lopt. Within the description of personalty also are included the produce of the land raised by labour and manurance, as corn growing, and such like produce, and it seems also those grasses which are usually called *artificial grasses*[e]. So also what are usually called vegetables or garden stuff, and obviously all manure not spread upon the land[f].

Inanimate goods of a moveable kind all fall under the description of personal chattels, to which class may be added property in any stock or fund.

Apprentices.

The relation between master and apprentice is not transmissible to the executor[g]; though, if the parties consent, the apprenticeship may be continued with the executor in the same trade.

Literary property.

Literary property, and the interest in a patent, by virtue of the several statutes relating to them respectively, are transmissible to the executor; and it may be generally laid down, that whenever an absolute property in any moveable chattels was vested in the testator, such property vests in the executor immediately on the testator's death, and in the administrator by relation from the death, wherever they are situated; the law giving a constructive possession to such representative where actual possession cannot be had.

[e] 2 Black. Com. 122, 123.

[f] 1 Bl. Com. 427, 428. Stra. 1115. 1266. Doug. 70.

[g] 11 Vin. Abr. 175.

He is also entitled to all personal equitable rights of his testator, and to the benefit of all personal contracts made with him. As if a lease be contracted to be made to B. and B. die before the lease is executed, the right vests in the executor, and the lease when made becomes assets in his hands[h]. So also will the damages recovered for the breach of such a contract: but the choses in action of a testator shall not be assets till they are recovered and levied[i]; unless indeed they are released by the executor; for his release thereof is equivalent in law to a receipt of the same[k]. But where the cause of action arises after the testator's death, the debt or damages are assets in law before the recovery by the executor. If a contract were made with the testator concerning his real estate only, a breach after his death gives to his heir, and not to his executor, a title to the damages.

All legal choses in action as well as equitable rights in personalty come to the executor.

Chattels which were never vested in the testator in possession, or which were limited to him upon a future event or condition, may come to his executor, and be distributable as assets in his hands. As where A. is entitled to a lease for years, or for his life, remainder to B., and B. dies in the lifetime of A., upon the death of A. the term shall go to the executor of B., and be assets in his hands; and even during the life of A., while it continues a remainder, B.'s executor is entitled to sell such remainder for its present value, and to hold the produce as assets. So after the death of a pawner or mortgagor, the right to redeem the chattel in pawn or mortgage devolves upon his executor, and the excess in the value of the thing beyond the money paid for redemption is assets.

So also, future and conditional interests in chattels.

[h] 11 Vin. Abr. 231.

[i] 11 Vin. Abr. 239, 240.

[k] Hob. 66.

Of the testator's trade, and the consequences of the executors carrying it on.

A man's trade or business terminates in law on his death, and if the executor carry it on, he is said to carry it on at his own risk[l], even though his name should not appear in it[m]. But under the sanction of the court of Chancery his representative capacity in respect to the business may be continued to him[n]. If he only disposes of the stock in trade he does not thereby become a trader, or subject to a commission of bankruptcy[o].

Of the executor's interest in legacies so due to his testators.

A contract made with, or a gift, grant, or legacy to, a man and his assigns, upon the death of the donee or grantee before performance or payment, passes t[illegible] executor or administrator as his assignee in [illegible] But it is to be remembered that he is only an [illegible] *in law;* therefore it has been held that if A. [illegible]nds himself to pay 10*l.* to the assignee of B. B.'s executor shall not have the money, because as executor he can only take to the use of the testator, though if the obligation were to pay the money to B. *or his assignee,* the right having vested in the obligee himself, would pass to his executor as assignee in law[q]

What chattels follow the inheritance.

Things annexed to and consolidated with the inheritance shall accompany it; therefore rents which are incident to the reversion, and which have not become in arrear in the lifetime of the testator, do not belong to the executor; and if the lessor die on the day on which the rent is payable, after sunset, and before midnight, the rent does not go to the executor, but to the heir, as in strictness it was not due till the last

[l] 1 T. Rep. 295.
[m] Cooke's Bkpt. Law, p. 67.
[n] 2 Ves. Jun. 34.
[o] 1 Atk. 102.
[p] 11 Vin. Abr. 156.
[q] 11 Vin. Abr. 161.

minute of the natural day [r].(1) So a term for years in trust to attend the inheritance shall accompany the real estate [s], and the trustee of a term raised for a special purpose, shall hold the same after the purpose is answered in trust for the person having the beneficial interest in the freehold [t].

If an absolute interest in a term, or the next presentation to a living, which is a mere chattel [u], is granted to a man and his heirs, the law will give it to the executor of the grantee [x]. But the powers and remedies incident to a rent charge descend to the heir, and accompany the inheritance [y], though the entry itself gives only a chattel interest to the party.

It is not competent to the guardian or trustee to change the value of an estate, unless he acts under a decree of a court of equity. Thus a lunatic's estate, if laid out in the purchase of lands, has been declared in equity to remain personal estate, and an account decreed [z]. The beneficial interest in a mortgage, unless controlled by positive provision, belongs to the personal representative, for the fund was personal, and the contract was personal, and so shall the security

[r] Har. Co. Litt. 202. n. 1.
[s] 11 Vin. Abr. 172.
[t] 11 Vin. Abr. 171.
[u] 11 Vin. Abr. 173.
[x] 11 Vin. Abr. 155.
[y] 11 Vin. Abr. 147.
[z] 11 Vin. Abr. 151.

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(1) But where a person having only an interest for his life in the land, demises it, and dies between the rent days, whereby the lease determines, his executors or administrators shall in an action for the use and occupation, recover a just proportion of the rent, from the last day of payment, to the death of the testator, by statute 11 Geo. II. c. 19. sec. 15.

be considered. Upon redemption, therefore, the heir must reconvey the land without receiving the money.

Tithes set out, muniments of land, &c.

If a person seised of an estate of inheritance in tithes die after they are set out, they will go to the executor [a]. Muniments of the land, such as charters, deeds and court rolls, pass with the estate to the heir; but if these writings are a deposit in the hands of another for securing a sum of money, the interest in them will devolve to the personal representative of such creditor on the principles before laid down.

Rabbits in a warren, fish in a pond, fruit, grass, hops, corn, &c.

As it has been before remarked of certain chattels personal connected with the estate, as rabbits in a warren, fish in a pond, &c. that they pass to the executor, with his chattel interest in the land, so they accompany the inheritance in its descent to the heir. Thus also trees and hedges unsevered, fruit ungathered, and grass growing, descend with the land to the heir as the permanent profits of the earth; though, as we have seen, *fructus industriales*, as corn raised by artificial culture, go to the executor. And so it is with hops, though growing on their ancient roots [b].

Of the conversion of property.

Where an executor has so mingled the property of his testator with his own, that it cannot be distinguished from it, or the property is of such a nature as not to be capable of being specifically followed, such property must be considered as of necessity altered, as where it consists of ready money, which cannot be taken in execution on a judgment against the executor, as being *de bonis testatoris*. And as he is incapable of suing himself, he may retain his own

[a] Com. Dig. Biens. A. 2. [b] Har. Co. Litt. 55. B.

debt out of the effects, which will amount to an entire conversion of the testator's property into his own, and that by mere operation of law, where his debt covers the whole assets.

Of the interest and authority of the administrator, and the differences in these respects between particular and general administrators;

The interest of an administrator as to the subject over which it extends, is commensurate with that of an executor. And so it is even where the administration is for a limited time, so long as it lasts. But in respect of authority, these particular and special administrations come short of the executor and general administrator, and vary from each other in many essential particulars. To all these restricted administrations, whether *durante minoritate, durante absentia,* or *pendente lite,* or in whatever other form, some powers belong in common. They may do whatever cannot be delayed without prejudice to that which is committed to their care. As for example, all produce which would grow worse by keeping, they may undoubtedly sell[c]. They may pay the testator's debts, and dispose of his unperishable property for that purpose[d]. They may also receive debts due to the testator[e], and may bring actions to recover them[f], and, lastly, they may retain debts which were due to themselves from the testator[g].

With the will annexed.

An administrator with the will annexed may assent to a legacy[h], but where the form of the grant is specially and expressly restrictive, as *ad usum et commodum infantis,* neither the power of assenting to a legacy, or of making leases, will go with the office.

[c] 11 Vin. Abr. 102. 103. Cro. El. 718. 5 Rep. 9. 5 Rep. 29. n. b. Hob. 250. [d] Com. Dig. Admon. F. 2 P.Wms. 576. [g] Com. Dig. Admon. F.
[h] 5 Rep. 29. b.

An administrator during infancy, may make leases of any term vested in the infant executor, which will be certainly good, till such infant executor come of age[i], and it is said till he avoid it by his entry. But he can do nothing to the prejudice of the infant, therefore he ought not to sell unless there is a necessity for it[k]; nor, indeed, will his assent to a legacy be effectual, unless he has assets for its payment[l], or his release of a debt, unless he has actually received it[m].

Joint administrator

A joint administration resembles in all respects a joint executorship[n]; and if one die, the right of administration survives to the others[o].

Durante absentia.

The statute 38 Geo. 3. c. 87. sec. 7. gives the same powers to an administrator *durante absentia* as are vested in the administrator during the minority of the next of kin; and by section 4. of the same act, in case of the absence of an executor for a year after the testator's death, out of the jurisdiction of His Majesty's courts, and a suit is instituted in a court of equity by a creditor, the court in which the suit is pending is empowered to appoint persons to collect in outstanding debts, or effects due to the testator's estate.

As the personal goods of the deceased devolve upon the executor or administrator, he has a right to take peaceable possession of such effects, and if resisted he has his remedy by action[p]; and on producing the probate or letters of administration at the bank, he has a right to have the funded property of the deceased

[i] 6 Rep. 67. b.
[k] 2 And. 132.
[l] 5 Rep. 29. b.
[m] 1 Roll. Abr. 910.
[n] 2 Vez. 267.
[o] 2 P. Wms. 121.
[p] 11 Vin. Abr. 267.

transferred into his own name. In a word, he has the same property in the effects of the deceased as the deceased himself had when living, the same power of disposing of them, and the same remedies for recovering or protecting them.

SECTION VI.

Of the Remedies at Law and in Equity.

FOR the recovery and protection of the rights and interests which are thus vested in an executor or administrator, the law has armed them with adequate means. Whatever actions the testator might have had to enforce the performance of personal contracts, the executor is competent to bring in his representative capacity; and even where the covenant for assuring lands was broken in the testator's life-time, the executor, though not expressly named, was held capable of bringing his action for the damages; damages being in such a case the principal subject, and not accessary to the realty only[a].

In what cases an executor has a remedy for a wrong done to the testator.

For injuries done to the person or freehold of the testator, or what the law calls torts, the executor has no remedy. But by virtue of the stat. 4 Ed. 3. c. 7. an executor is entitled to recover by action a compensation in damages for a trespass, in taking away the testator's goods in his life-time; and by an equitable extension of the benefit of that statute, he may have other remedies for injuries done to the testator's

[a] Com. Dig. Admon. B. 13.

chattels, in his life-time, as trover, for the conversion of the testator's goods, or trespass, for cutting the corn growing on his *freehold*, and carrying it away, or for entering with cattle on the testator's *leasehold* premises[b]. An executor is, also, under the same beneficial construction of that statute, entitled to a debt accrued to the testator for not setting out tithes, and to the remedy for such debt given by the statute 2 and 3 of Ed. 6. c. 13[c]. In a word, the executor may have his remedy by action for every injury done to the testator's personal estate before his death. And it seems also, that he may maintain ejectment for an *ouster* of the testator, even from premises whereof he was seised in fee, proceeding for damages only[d], as a lessee may do where his interest expires, pending the suit. If the premises were leasehold, he is entitled to his ejectment for recovering the term by the common law. And on the same authority he may avow for rent in arrear at the testator's death, as incident to a reversion for years[e]. He may have his action of replevin for goods distrained in the testator's life-time[f].

Where the cause of action has happened since the testator's death.

In numerous cases too, where the cause of action has happened since the testator's death, the executor may bring his action *as such*, where the subject of the action vests in him in that capacity. Thus he may maintain *quare impedit*, where the testator died possessed of a term in an advowson, and the disturbance was after such death; as he also might where the testator died within six months after the

[b] 3 Bac. Abr. 59. 1 Vent. 187.
[c] 1 Sid. 88. 497. 1 Vent. 30.
[d] 1 Vent. 30. 3 T. R. 13. [e] 1 Roll. Abr. 672.
[f] 1 Sid. 82. Gilb. l. of dist. 3 ed. 156.

usurpation[g]. So also wherever a debt arose after the testator's death, upon a contract made with him in his life-time, or where a bond was forfeited, or the goods taken after that event. And he may avow in that character for rent of leasehold premises, becoming due from the under-tenant after the testator's death[h]. In like manner he may bring an action as executor, wherever a contract is made with him as such.

When an executor is, and when he is not, liable to costs.

Where he is plaintiff in an action, which he must bring in his representative capacity, he pays no costs, either on a nonsuit or verdict; but if he may bring the action without naming himself executor, there he is liable to costs, whether he names himself executor or not, if he fail. As where in trover, both the trover and conversion were subsequent to the death of the testator[i]; or where he proceeds in assumpsit for monies had and received after that event[k]. Nor will he be exempt from costs where he fails through his own mispleading[l], gross misconduct, or wilful default. For an escape out of execution on a judgment obtained by the testator, whether the escape happened in the life-time[m], or after the death of the testator[n], the executor may bring his action, and recover against the sheriff, in his representative capacity; so also where the escape happened on a judgment recovered by himself as executor. (2)

[g] Poph. 189. 4 Leon. 15. [h] 11 Vin. Abr. 204.
[i] 7 T.R. 358. [k] 7 T. R. 234. [l] 6 T. R. 654.
[m] Cro. Car. 297. Dy. 322. [n] 3 Bac. Abr. 57.

(2) 2 T. R. 128. Whether an action does or does not lie as between executors for an escape in the testator's life-time, depends upon the distinction between a tort which does, and a tort which does not, vest an interest in the party wronged. In the case of a

Of the relief given by the statute 17 Car. 2. c. 8.

At common law, if the plaintiff died after final judgment, and before execution, the executor or administrator might proceed to final judgment, by first suing out a scire facias; and, if the testator died after execution by fieri facias had been taken out by him, the sheriff might go on to levy the money, and might pay it over to the executor. If the plaintiff died at any time before final judgment, the suit abated, and the executor had to begin afresh. But by the statute 17 Car. 2. c. 8. if either the plaintiff or defendant in a cause, die after verdict, and before judgment, the death shall not be alleged for error, so as the judgment be entered within two terms after the verdict; and if the death take place *after* the assizes have commenced, though *before* the verdict, the case is remedied within the act. On this statute the judgment is entered as if the deceased party were still living[o]; but before execution can be had upon it, there must be a scire facias to revive it, and judgment must be entered within two terms after the verdict, and such scire facias must proceed in conformity with the judgment, and be general, as on a judgment against the party, as if he were living.

[o] 1 Salk. 42.

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mere tort, the rule of actio personalis moritur cum persona strictly holds. Thus an executor cannot maintain an action on the case for an escape on mesne process in his testator's life-time. But for an escape out of execution in his testator's life-time, an executor may have his action on the case, on the equity of the stat. 4 Ed. 3. In the case of a devastavit, that being a wrong vesting an interest, and a debt arising ex delicto, the action survives to the executor. See Berwick *v.* Andrews, 2 Lord Raym. 971. But an action will not lie against an executor for an escape in the life-time of his testator.

Of the relief given by the statute 8 and 9 Wm. 3. s. 6.

By the statute 8 and 9 Wm. 3. c. 11. sec. 6. provision has been made for the death of the plaintiff, after interlocutory, and before final judgment. The action in such case shall not abate, if it were of such a nature as might have been originally brought by the executor or administrator, but the executor or administrator shall have a scire facias against the defendant; or if the defendant die after such interlocutory judgment, against his executor or administrator. And if the defendant, his executor or administrator, appear, and shew no cause to arrest the final judgment; or on a scire facias, or two nihils, make default, a writ of inquiry shall go, and being executed and returned, judgment final shall be given against the defendant, or against his executor or administrator. On this latter statute the judgment is to be entered for or against the executor or administrator, and not as under the stat. 17 Car. 2. for or against the party himself.

Temporary executor; executor of an executor; husband of an executrix; co-executors.

A temporary executor may bring actions as well as an executor generally constituted, and the same right devolves upon the executor of an executor by virtue of the statute 25 Ed. 3. c. 5. The husband of an executrix has also the full right of bringing actions, but he cannot sue in the representative capacity without joining his wife. As co-executors make but one person, in consideration of law, they must all join in such actions as are brought in his right, even those who have not proved the will[p]. And to prevent a collusion between a debtor and a co-executor the law has provided that if one executor refuse to join his com-

Summons and severance.

[p] Com. Dig. Pleader. (2. D. 1.)

panion in an action for recovering a debt due to the testator's estate, the willing executor first commencing the suit in the names of both, may afterwards, by summoning the other, obtain what is called a judgment of severance, which is an authority to sue alone; and the same judgment shall be given for default upon the summons; and then the executor so having summoned may proceed without the other, and the judgment and execution shall be in the name of the executor so proceeding alone[q]. So that if the party so severed die pending the proceedings, the suit shall not abate[r].

Of the remedies of an administrator.

An administrator, has legal remedies corresponding and co-extensive with those of an executor. Even where their authority is special and limited they may maintain actions for recovering the property of their intestates[s]. By the 48 G. 3. c. 149. an ad valorem duty is imposed upon probates and letters of administration, and the stamp must be to the full value of the assets, including the outstanding debts due to the deceased. And the administration is invalid unless a stamp of a sufficient value is obtained. If an administrator brings his action to recover a sum of money due to the deceased which exceeds the amount covered by the ad valorem stamp, upon proof of the deficiency of the stamp, the action must fall to the ground; even though the claim which he seeks to enforce was doubtful. The act makes no allowance for dubious or hazardous debts. Nor will the plaintiff be allowed to establish his claim by evidence,

Ad valorem duty upon administration.

[q] 3 Bac. Abr. 33. Cro. Car. 420.
[r] Co. Litt. 139. [s] 2 P. Wms. 576.

and afterwards to take out a stamp for the increased value. And it seems that a defendant will defeat the action by proving the assets, together with the sum claimed by the action, to exceed the value for which the stamp was taken[t].

If the limited office of an administrator durante minoritate expire after judgment obtained by the executors attaining his age, such executor may have a scire facias to execute the judgment[u].

Of the consequences of the deaths of executors or administrators as to suits depending.

The distinctions in respect to the prosecution of suits interrupted by the deaths of the personal representatives should be carefully attended to. By statute 17 Car. 2. c. 8. an administrator de bonis non is rendered capable of suing a scire facias on a judgment after verdict recovered by an executor or administrator; which he could not do by the common law. And if the executor or administrator had sued execution, and before the return died, the administrator de bonis non, by the equity of the above statute, is permitted to perfect execution[x]. And if at the time of the executor's or administrator's death, the money was actually levied, it shall be brought into court, and the administrator de bonis non, on producing his letters of administration, shall be entitled to receive it[y]. And so it is said he would even if the judgment had been by default[z]. The statute extends only to judgments after *verdict*, so that if the executor or administrator dies after obtaining judgment without a previous verdict, the case is at common law, and the administrator de bonis non, on account of his paramount title and want of privity, being representative of the first testator or

[t] Hunt *v.* Stephens, 3 Taunt. 113.
[u] 3 Bac. Abr. 18. Cro. Car. 127.
[x] 2 Lord Raym. 1072.
[y] 2 Lord Raym. 1074.
[z] 6 Mod. 299.

intestate, is obliged to recommence the action[a]. But if such judgment were for goods taken out of the executor or administrator's own possession, the immediate representative of such executor or administrator shall have scire facias, and account with the administrator de bonis non[b].

If an administrator durante minoritate obtain judgment he may have a scire facias against the bail, even after the executor has attained his age, though it seems doubtful whether he or the executor shall sue execution[c].

Of proof under bankruptcy.

An executor may prove a debt due to his testator under a commission of bankruptcy, and may sign as such the certificate, but if he has a demand of his own against the estate, as well as one in right of his testator, he will not be allowed to sign in both capacities[d]. The executor of the bankrupt is intitled to his allowance[e].

Of obtaining an adjustment of the claims in equity.

Where an executor finds the administration of his testator's property embarrassed, difficult, or hazardous, he may have the claims of the creditors adjusted by a court of equity, by instituting a suit against the creditors for that purpose[f].

Of the remedy of an executor against his co-executor in equity.

In equity one executor may sue his co-executor; and if co-executors commence proceedings in that court, and one of them die, the suit will not abate. And if an administrator durante minoritate bring his

[a] Cro. Jac. 4. 1 Roll. 5 Rep. 9. b. [b] Yelv. 33.
[c] 2 Lev. 37. [d] 1 Atk. 85. [e] Id. 208, 209.
[f] Com. Dig. Chancery, 3. G. 6.

bill in Chancery, and the executor attain his age pending the suit, he may continue the suit by a supplemental bill[g].

If pending the suit the plaintiff die, his executor may continue it by bill of survivor. And if a bill be brought by an administrator durante minoritate, and pending the suit the executor come of age, he may continue the suit by a supplemental bill[h].

An executor may have relief by injunction in equity to restrain a person in possession of private letters of the testator from publishing them without the permission of the plaintiff[i].

Upon the death of a partner in trade his interest in the stock devolves upon his executor or administrator, and shall not survive to the surviving partners; although the remedies for recovering the joint property survives. Equity treats the survivor as a trustee for the representatives of the deceased partner who are considered as having a specific lien on the share of the deceased[k].

[g] Mitf. Plead. 61.
[h] Mitf. 61.
[i] Ambl. 737.
[k] 1 Vez. 242.

SECTION VII.

Of the duties of an Executor in respect to the Funeral and Official Charges, and payment of Debts.

TO provide for the funeral is naturally first in order; an office that may be discharged before probate; and the expences connected with which stand in priority before all other debts and charges[a]; but extravagance should be avoided, as unnecessary expence will not be allowed against the creditors. The amount should be regulated with reference to the circumstances of the deceased.

The proof of the will is the duty and charge which the executor is next called upon to perform and satisfy. The inventory succeeds, which, in pursuance of the bond to be entered into according to the stat. 22 and 23 Car. 2. c. 10. must exhibit a true and perfect account of the goods, chattels, and credits of the deceased which have come to the possession of the executor; and though no such inventory is in practice exhibited in general cases, yet an executor or administrator is always subject to be cited for that purpose in the spiritual court; and the spiritual judge will, in special cases, at the instance of a party interested decree an inventory to be exhibited before the issuing of the probate or letters of administration, and the same must be substantiated by a special oath[b]. An inventory, after being exhibited on oath, cannot be impeached in the ecclesiastical court; yet objections may be made to it which must be answered upon oath,

[a] 11 Vin. Abr. 432. [b] 4 Burn's Eccl. L. 266.

but such oath cannot be contradicted: the more effectual relief lies in a Court of Equity.

The next duty of an executor or administrator is the payment of the debts of the deceased which must be done in the legal order. Of the legal order in which debts are to be paid.

First, the debts due to the crown by record or specialty.

Secondly, those arising upon certain statutes.

Thirdly, debts of record in general.

Fourthly, debts due by specialty in general.

Fifthly, debts due by simple contract;

And here it may be observed, that all obligations or specialties to the use of the king are of the same nature as a statute staple[c], but to be entitled to this paramount preference, the debts to the king must arise by record or specialty; and therefore all debts to the king which are of no higher degree than simple contracts, though they are to be preferred to debts by simple contract due to the subject, are nevertheless inferior in rank to debts of record or specialty due to the subject: thus fines and amerciaments arising to the king in courts baron, or courts not of record, or for copyhold estates, or forfeitures by outlawry or attainder before office found, are not entitled to the preference above stated to belong to the crown. But if the king's immediate debtor be outlawed, then whether such debt becomes a debt of record by the outlawry or not, will depend upon the fact whether it be on mesne process, or after judgment. In the former case it is not, in the latter it is, a debt of record[d].

[c] Dalt. Sheriff. 55. 123.

[d] 11 Vin. Abr. 291.

And if a debt by specialty be assigned to the king, his prerogative does not attach upon it so as to entitle it to payment by the executor before bond or judgment creditors[f]. It is said also that rents due to the crown have only the rank of simple contract debts[g]. The forfeitures on some particular statutes come next to the debts to the crown by record; as the forfeiture for not burying in woollen by 30 Car. 2. c. 3. money due from the overseers of the poor by 17 Geo. 2. c. 38. s. 3. and to the post-office for letters by 9 Ann. c. 10. s. 30.

Next to the king's debts of record, with the exceptions above mentioned, debts due upon judgments (*that is,* upon judgments against the testator,—not the executor,) in all courts of record, or decrees in Equity[h], are to be paid, whether such judgments be voluntary or *in invitum.* Nor is there any distinction between judgments actually entered up against the testator, and those which are entered up after his death, but which relate to a verdict obtained in his life-time, and are therefore to be regarded as if given in his life-time, under the stat. 17 Car. 2. c. 8., or those, which, being signed at any time during the term or the vacation immediately subsequent, relate back to the first day of the term by the common law, although the defendant died before the signing[i]. It seems, however, that a final judgment entered up against the testator after his death, grounded upon an interlocutory judgment obtained against him in his lifetime pursuant to the stat. 8. c. 9. Wm. 3. c. 11. being to be entered against the representative and

[f] 11 Vin. Abr. 301.
[g] 3 Bac. Abr. 80.
[h] 2 Fonbl. 412. n. (s)
[i] 6 T. Rep. 368. 7 T. R. 20.

not the intestate himself, cannot be pleaded by an administrator to an action brought against him on a bond[k]. Priority of judgments does not depend either upon the dignity of the court (provided it is a court of record,) or upon the original cause of action. It is of the same strength whether the debt was by simple contract or by specialty[l].

Between judgments, priority of time is immaterial —the executor may satisfy which he pleases, unless a preference has been gained by a *scire facias* sued out upon the judgment. But if two judgment creditors take out, each of them, a *scire facias*, the executor may give a preference to that upon which the *scire facias* was last sued out, by confessing the action[m]. A judgment in a foreign country has the rank only of a simple contract debt[n], and so it is with respect to a judgment not docquetted according to the stat. 4 and 5 W. & M. c. 10[o]. In such a case the docquetting is the only notice that the executor need attend to; but as the statute does not extend to judgments in inferior courts of record, the executor must take notice of them at his own peril[p]. There must be actual or implied notice of a decree to make an executor liable for not giving it its preference, and the only implied notice has been held to be the pendency of the suit[q]. But the executor must have his protection and indemnity for such payments under decrees against suits by the other creditors, by

[k] Com. Dig. Pleader, 2 D. 9. [l] 11 Vin. Abr. 299.
[m] 11 Vin. Abr. 299. [n] 11 Vin. Abr. 291. Doug. 1.
[o] 3 Bl. Com. 397. 6 T. Rep. 384. 1 Bos. and Pul. 307.
[p] 3 P. Wms. 117.
[q] 2 P. Wms. 482. 2 Fonbl. 156. not. (n.)

application to equity for an injunction[r]. Debts due upon recognizances, such as are usually entered into before a court of record, or magistrate duly authorised, to appear at the assizes, to keep the peace, to pay debts, &c. statutes merchant, statutes staple, and recognizances in the nature of statute staple (which last description of securities are now but little used) come next, and the date of them is immaterial, with respect to the payment.

Debts by specialty are next in rank to debts of record, as for rent, (whether such rent be reserved by lease in writing or by parol[s],) or on bonds, covenants, and other sealed instruments, and these debts are all, *inter se,* of equal dignity. The profits of the land leased are, in all cases, to be applied by the executor to the payment of the rent; and if they are insufficient to answer such rent, the residue is payable out of the general assets, as other debts by specialty. A bond, even before it is due. ranks before a simple contract debt, and the executor may plead the *existence* of such a bond, in defence to an action by a simple contract creditor[t]. But the executor ought not to pay the money upon a bond *not yet due* in preference to a bond-debt already due: and the liability upon a contingent security, before the contingency happens, shall not be admitted to delay the payment of a simple contract creditor[u]. Where the contingency has taken place, it is as if there had been no contingency at all[x]

Simple contract debts are to be preferred to bonds

[r] 3 P. Wms. 401. not. (F.)
[s] 3 Bac. Abr. 82. 96.
[t] 3 Bac. Abr. 81.
[u] 11 Vin. Abr. 105.
[x] 5 T. Rep. 307.

merely voluntary; but such bonds are, nevertheless, to be satisfied before legacies[y].

The next order of debts are those arising upon simple contract; but it seems, that among debts of this description, the claims of the King are to be first satisfied[z]; and, with that exception, the executor may prefer whom he pleases in the order of payment, among the creditors of this class, except that it has been said that the wages of servants are entitled to a preference. If an action be actually brought against an executor for a debt of the testator, a right is gained to the payment of that debt in preference to the other debts of the same degree (1). But if another creditor of the same class afterwards brings his action, and first recovers judgment, he must first be satisfied; and the executor may accelerate such right by confessing judgment to the action latest brought[a]. Such confessed judgment, though entered after an interlocutory judgment obtained at the suit of another, shall stand before it in the order of payment[b]. But it has been very recently decided that the contrivance of an executor to extend this prefer-

[y] Ca. temp. Talb. 156.
[z] 3 Bac. Abr. 80. in not.
[a] 11 Vin. Abr. 296. 1 P. Wms. 295. [b] 2 Atk. 386.

(1) It is true, that where an action is brought by a creditor of the testator against his executor, he is restrained from paying any other creditor in equal degree; yet any of the creditors may file a bill in a court of equity against the executor for an account, in which case all the creditors may, as it seems, be compelled to take an equal distribution of the assets.

ence by confessing a judgment to one creditor as a trustee for many others, cannot be supported[c]. This power of preferring one creditor to another in equal degree, may, under particular circumstances, be exercised in furtherance of justice; but the general duty of an executor is, certainly, to make an equal distribution among creditors in equal degree. Notice of a specialty debt obliges the executor to the payment thereof, before any debt of inferior degree; nor is it material in what manner such notice comes to him. *Lis pendens* is always notice; and of debts of record an executor is bound to take cognizance, provided they are docquetted, where the statute requires it.

Without actual notice, or what the law considers as notice, the executor is justified in paying an inferior debt, although a superior debt should thereby go unsatisfied. But this should not be done with such precipitance as not to leave time to specialty creditors to give notice of their debts; as unreasonable haste would be evidence of fraud. And it is to be observed that an executor acts illegally in confessing judgment to an action for an inferior debt, after notice of the existence of one of a higher description[d].

An executor may retain out of the assets in his hands, the amount of a debt of his own, in preference to all the debts of other persons standing in equal degree; but he has no such advantage against those whose debts are above his own in degree. If

[c] 1 M. and S. 395. [d] 1 T. R. 690.

the same person is executor of both the obligor and obligee, or executor of the one and administrator of the other, he may retain, as the representative of the debtor, the amount of the debt owing to him, as representative of the creditor[e]. And this right of retention devolves to the executor of an executor[f]. A special executor or administrator, whose authority is limited as to time, or extends over only *a part* of the assets, possesses the same privilege *pro tanto;* and though an *executor de son tort* has no such right, yet if administration be granted to a creditor, and afterwards repealed at the suit of the next of kin, such creditor may, nevertheless, retain against the rightful administrator[g]. And if a creditor, being appointed executor with others, refuse to administer, he may sue the other executors for the debt[h]. If a surety in a bond be made the executor of his principal, and after his death is compelled to pay the bond debt, this does not give him a right to retain on the footing of a bond creditor on his testator's estate; but it has been said that it authorises him to retain in quality of a simple contract creditor[i]. But in all these cases it is to be remembered that an executor shall not be allowed to retain his own debt, to the prejudice of his co-executor in equal degree, but the assets shall go in discharge of both their debts in the same proportion[k].

[e] 11 Vin. Abr. 261.
[f] 11 Vin. Abr. 263.
[g] 11 Vin. Abr. 265.
[h] 11 Vin. Abr. 262.
[i] Toll. Ex. 2d. Edit. 298.
[k] 11 Vin. Abr. 72.

SECTION VIII.

Of the Duty of Executors as to the payment of Legacies. *

THE principal doctrines and decisions concerning legacies in general, are treated of in the former

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* The great legacy act is the 36th Geo. 3. c. 52. which imposes the following duties upon legacies, and bequests of personal property, i. e. upon all legacies of 20*l.* and upwards, and upon all residuary bequests and shares of residues in case of intestacy, of 100*l.* and upwards.

Brother or sister, or their descendants,	2 per cent.
Uncle or aunt, &c. - - -	3 per cent.
Great uncle, or great aunt, &c. -	4 per cent.
Other persons, - - - -	6 per cent.

This act directs that the duties shall be managed by the Commissioners of Stamps.—The stamp act of the 44th of Geo. 3. c. 98. enacts that all former *duties*, under the care of the Commissioners of Stamps, shall cease, and in their stead imposes the following duties upon legacies and bequests out of the personal estate, of 20*l.* or more; and upon all residues and shares of residues of 100*l.* and upwards, i. e.

Brother or sister, &c.	£2	10	per cent.
Uncle or aunt, &c. -	4	0	
Great uncle or aunt, &c.	5	0	
All other persons, -	8	0	

By this act, the duties, &c. given by other acts are to cease, but no other parts of such acts are repealed, so that the new duties imposed by it are to be collected and managed in the same manner as the old duties. *The new legacy stamps* hereby imposed are, therefore, to be collected, managed and computed, by the Commissioners of Stamps, according to the direction of the 36th Geo. 3.

By the 45th Geo. 3. c. 28. a duty is imposed on legacies to children, &c. of 1 per cent. and a new duty of 10 per cent. in lega-

volume. This section will therefore be confined to the mere duty and office of the executor concerning them.

To the duty of the executor, every other claim under the will, as to the personal property of the tes-

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cies to strangers, &c. instead of the duty of 8 per cent. by the 44th Geo. 3.

The duties imposed by this act, and by those of the 44th of Geo. 3. are likewise extended to bequests of monies arising from, or charged upon real estates, &c.

The 48th Geo. 3. c. 149. repeals the *duties* granted by the 44th and 45th Geo. 3. but with respect to legacies and residues, imposes the same again as they stood after the 45th Geo. 3. with very little variation.

The legacy duties, as they now stand, by the 48th Geo. 3. c. 149 are as follows :—

For children and their descendants, - -	£1	0	per cent
Brother or sister, and their descendants, -	2	10	
Uncle or aunt, and their descendants, - -	4	0	
Great uncle or great aunt, and their descendants,	5	0	
All other persons, - - - - - -	10	0	

These duties are imposed upon all legacies of 20*l.* and upwards, either out of the personal or moveable estate, or out of or charged upon the real or heritable estate, or out of any monies to arise by sale, mortgage, or other disposition of the real estate, or any part thereof. Also for the clear residue (when devolving to one person) and for every share of the clear residue, (when devolving to two or more) whether arising from a testamentary disposition, or from a partial or total intestacy, where such residue shall be of the value of 20*l.* and upwards. And also for the clear residue (when given to one) and for every share of it, (when given to two) of the monies to arise from the sale, mortgage, or other disposition of the real estate, when of the value of 20*l.* and upwards.

And all gifts of annuities, or by way of annuity, or of any other partial benefit or interest out of any such estate or effects as aforesaid, are to be deemed legacies within the intent and meaning of the schedule.

As to the necessity for the assent of the executor; and its effect.

tator, is subordinate. It is his duty to see that the fund is first applied to the satisfaction of the *creditors.* No legacy, therefore, takes effect in the legatee, until executed by the assent of the executor; but the assent of one of several executors is sufficient[a]. The personal property devolves first upon him to fulfil his primary duty of paying the debts of his testator. And if, notwithstanding a deficiency of assets, he pays legacies, he makes himself responsi-

[a] Com. Dig. Admon. (c. 8.)

Out of this act, however, are excepted all legacies, residues, and shares of residues of any such estate or effects as aforesaid, given or devolving to or for the benefit of the husband or wife of the deceased, or to or for the benefit of the Royal Family.

And all legacies exempted from duty by an act of the 39th Geo. 3. c. 73. for exempting certain specific legacies given to bodies corporate or other public bodies, from payment of duty.

By the 3d section of this act, the new duties are to be under the management of the Commissioners of Stamps, &c. and they are empowered to employ such officers or persons under them, and to do all such other acts and things as shall be thought necessary for carrying the act into execution, in as full and ample a manner, as they or any former commissioners are or have been authorised to do, for the raising or collecting of any former stamp duties, or for putting into execution any act or acts of parliament relating thereto.

By sect. 8. the powers and provisions of former acts are to be put into execution with regard to duties under this act.

Cases of all persons dying, after the 5th April, 1805, where the legacies, &c. are paid after the 10th Oct. 1808, are included in this act.

A principal difference between this and former acts, with regard to the legacy duty is, that the duty imposed upon bequests of the residue, &c. is extended to all cases where the amount is 20*l.* and upwards. Whereas, in former statutes, the duty upon residuary bequests was only imposed where they amounted to 100*l.* and upwards.

ble to the extent of the legacies so paid to the creditors.

This assent of the executor is equally necessary, whether the legacy be general or specific. And if the legatee, in either case, takes the thing bequeathed, without such assent, he is liable thereby to an action of trespass by the executor. Even if the chattel be in the hands of the legatee at the time of the testator's death, he cannot retain it against the demand of the executor. If such legacy is payable out of the general funds of the testator, the law will not raise an implied promise on proof of an acknowledgment of assets, so as to enable the legatee to bring an action at law, the reasons of which rule are well expounded in Deeks *v.* Strutt[b]. But in the case of the bequest of a specific thing, the assent passes the legal title under the will[c]. The rule is the same, whether the subject of the bequest be a personal or real chattel. And the assent of the executor vests the term, or other specific thing bequeathed, in the legatee, from the death of the testator, by relation[d].

Difference as to the effect of assent in the cases of general and specific legacies.

As this interest is vested in the executor for the sake only of other persons, it is compatible with an interest vested in the legatee, which, if he die before the executor's assent, passes to his personal representatives.

[b] 5 T. R. 690.

[c] Doe d. Lord Saye and Sele *v.* Guy, 3 East. 120. and see Paramour *v.* Yardley, Plowd. 539.

[d] Saunders's Case, 5 Rep. 12. b. Chamberlain *v.* Chamberlain, 1 Chan. Ca. 256. Bastard *v.* Stukeley, 2 Lev. 209. Barton's Case, 2 Freem. 289.

Even the release of a debt by the will of a creditor, and which operates by extinguishment rather than by donation, is so far in the nature of a legacy, that to be complete and effectual, it ought to have the executor's assent[e]. But in all cases, and in the last more especially, a slight expression, or demonstration of assent, is sufficient.

What amounts to an assent.

The assent of an executor may be inferred from his acts, and such constructive assent will be as available as an assent positively and expressly given. Any recognition of the property, or right of the legatee, amounts to an assent;—as if the executor, in any manner, deals with the legacy as the owner[f]. If a term of years be devised to one for life, remainder to another, the assent of the executor to the first devise, operates as an assent in favour of the remainder man[g], and an assent to the remainder is an assent to the preceding estate; for, in legal consideration, they make together but one estate[h]. Nor can the executor give such assent, upon terms which subject it to be withdrawn upon any subsequent event; but he may impose a condition, precedent to the payment of the legacy, though he cannot encumber it with future stipulations: and whenever the assent is given, it must relate to the testator's death, and perfect the title of the legatee, *ab initio.* An assent to a devise for a lease for years, is also to be considered as an assent to all conditional springing or contingent interests, coupled with it by the devise[i].

[e] 2 P. Wms. 332.
[f] 4 Bac. Abr. 445. 2 Vent. 358.
[g] 1 Roll. Abr. 620. Plow. 545. n.
[h] Com. Dig. Adm. (c. 6.)
[i] 1 Roll. Abr. 620.

Thus, an assent to the devise of a term in land, is an assent to rent or common, devised out of it[k]. Though it is said that if a man have a lease for years, and devise out of it a rent or common to A., and devise the lease itself to B., and die, and his executors pay the rent, or assent that A., the devisee of the common, shall put in his cattle and use the common, this is no assent that B. shall have the term, for they are distinct things[l].

An assent by one named executor in a will is of no avail, unless he has attained the age of twenty-one years[m]; but, as we have seen, he may consent, before taking out probate.

If a power is given to an executor to divide money among children at his discretion, his disposition must not be unreasonable, and where a grossly unequal distribution, under such circumstances, has been made, equity has set it aside, and decreed an equal distribution[n]. An equal distribution may not, in some cases, be a reasonable distribution, and in one case the court decreed a double amount to one who stood in greater need of it than the other objects of the distributive bequest[o]. In the exercise of such discretionary authority the executor may vary the amount among the objects, but not in an illusory, or plainly inequitable manner[p].

An assent to a void legacy must necessarily be itself Of the executor's

[k] 1 Roll. Abr. 620. [l] Plow. 521.
[m] Stat. 38 Geo. 3. c. 87.
[n] 4 Bac. Abr. 340. 2 Vez. 640. [o] 2 Vern. 421
[p] 5 Vez. Junr. 149 7 id. 124. 9 id. 382.

execution of a legacy to himself. void, upon the same principles as an attornment to a void grant is without effect in the law[q]. Where an executor is also a legatee his assent is necessary to vest the legacy in him in the capacity of legatee; and until he is acquainted with the competency of the assets he cannot claim it as such. If he enters or takes possession generally, without claim or demonstration of his election, it is said he shall have it as executor, and not as legatee[r]; and it follows upon principle, that an executor's execution of a legacy to himself, must operate as a confirmation of an ulterior interest in another person in the same thing[s]. His consent to his own legacy may, like his assent to the legacy given to another, be express or implied. His acting upon it in any manner as a legacy, and still more his declaration that he takes it as such, constitutes an assent effectual to render him a legatee[t]. And if a legacy is given to a man for his trouble in the execution of his office, he must either act in it, or shew his intention so to do, in order to become intitled to it[v]. And lastly, in the case of a devise to several executors, one of them may assent for his own part[w].

Of the time of vesting. To the proper discharge of this branch of an executor's duty, a knowledge of the rules and circumstances which have decided the important question when legacies and legatory portions are to be considered as vesting, and when and from what time interest is to be paid upon them, is very material. I

[q] Vin. Ab. tit. Devise, E. a. 2 pl. 2.
[r] Dy. 277. 1 Rol. Ab. 61. 10 Rep. 47. b.
[s] Paramour v. Yardley, Plow. 541.
[t] 1 Lev. 25. 1 Rol. Ab. 619. 920. Plow. 539. Dy. 277.
[v] 4 Vez. Jun. 212. [w] 1 Roll. Abr. 618.

shall endeavour to state the effect of these determinations in the clearest manner, consistent with a convenient brevity.

It can scarcely be necessary to observe, that the year given to the executors for collecting the assets, does not prevent the vesting; and that consequently the money must be paid to the representative of the legatee, dying before the end of the year[x]. Whenever a legacy is given, and the gift and time of payment are both future, as, if I give to A. B. a legacy of —*l.* at and when he comes of age, there the time is annexed to the gift and substance of the thing, and if the legatee die before he comes of age, the legacy lapses[y].

A direction to pay interest upon legatory portions, where they are charged upon personalty, is always evidence of the vesting, for so it is always held in the Civil and Ecclesiastical Courts, from which the rules respecting legacies and legatory portions are drawn. But it is otherwise where the portion is provided by deed[z]. With respect to all interests arising out of land, the general rule is, without regard to the question, whether the land be the primary, or only the secondary and auxiliary fund—or whether the charge be made by deed or will—or whether it be a portion, or a general legacy—or for a child or a stranger—or with or without interest—that charges upon land payable at a future day, shall not be raised where the

[x] 10 Vez. Jun. 13.

[y] 1 Eq. C. Abr. 295. 1 Vez. 48. 3 Atk. 101. 645. 1 Burr. 227. 3 Vez. Jun. 135. Sansbury *v.* Read, 12 Vez. Jun. 75. Hixon *v.* Oliver, 13 Vez. Jun. 108.

[z] Lord Teynham *v.* Webb, 2 Vez. 207. Herbert *v.* Parsons, id. 263.

party dies before the day of payment. This is the *general* rule, but there are many exceptions; as where the time of payment is postponed from the circumstances not of the person but of the fund: thus where a legacy is charged on land, to be paid after the death of the testator's wife, there if the legatee die after the death of the testator, and before the death of the wife, the legacy goes to the representatives of the legatee [a]. But wherever a legacy charged on real property is given expressly with a view to the wants and occasions of the legatee at a particular time, as at 21, or marriage, if the legatee die before the time at which, according to the intention of the testator, the legacy would be wanted, it sinks into the land. And where the fund is mixed, the vesting may depend upon the question whether it was necessary to resort to the personal estate [b].

Mr. Cox observes, in his note to the cases of the Duke of Chandos *v.* Talbot, that where portions have been given out of land, and no time of payment is expressed, the determinations are difficult to be reconciled; some considering them as presently vested, and others that they do not vest, if the legatees die before they want them. But perhaps the cases may be reconciled by adverting to this distinction, viz. that where no time is given, and interest is made payable, they vest immediately; and that where no time is expressed, and interest not given, they do not vest before 21, or marriage [c]. If the sum itself which is

[a] Tnustal *v.* Bracken, 1 Bro. C. R. 124. note; and Ambl. 167.

[b] 1 Vez. Jun. 48. See the note to the case of the Duke of Chandos *v.* Talbot, 2 P. Wms. 612.

[c] 2 Eq. C. Abr. 218. Ch. Ca. 181. Prec. in Ch. 318. 3 Atk. 645.

to be paid at a future time is uncertain, it cannot vest in the interim[d]: and wherever payment is postponed till 21, though it may vest for some of the above-mentioned reasons, yet the representative cannot claim it, until the party, had he lived, would have been 21[e].

A legacy given at a particular age may vest immediately on the death of testator, by force of the accompanying words, as where a trustee is appointed for the legatee during his minority[f]. But mere directions for maintenance do not, as it seems, avail to this purpose[g].

Of lapse.

To prevent a lapse of a legacy, a will should be specially penned[h]. Thus, where testatrix forgave a debt, and desired her executors to deliver up the bond to the debtor, it was held that it did not lapse by his death before testatrix[i]. And if a testator expressly directs that his legacies shall not lapse by the deaths of the legatees in his life-time, and then gives a legacy to B. his executors, and administrators, the legacy will not lapse though B. die in testator's life[k]. Where a legacy is given in consideration of paying an annuity, and the legatee dies in the testator's life-time, the annuity shall be a charge on the residuum, though the legacy lapsed[l].

[d] Maddison *v.* Andrew, 1 Vez. 57.
[e] 2 Vern. 199. 2 Vent. 342.
[f] 6 Vez. Jun. 239. 7 Vez. Jun. 421.
[g] 2 Vez. 207, 262. 1 Burr. 227. 2 P. Wms. 612. note 1.
[h] 3 Atk. 572, 582. [i] 1 Vez. 219. 1 P. Wms. 83.
[k] 3 Atk. 572. 3 Bro. C. C. 224.
[l] Oke *v.* Heath, 1 Vez. 141.

Of abatement. Where there is not enough to pay both the debts and legacies, the legacies must be reduced proportionably. In case of a deficiency, charity legacies must abate in proportion, and so must legacies given to executors for their trouble. Small gifts, indeed, to the poor of a parish have been considered as doles, and part of the funeral, and therefore exempt from this liability: but legacies to servants abate. Specific legacies do not abate with the pecuniary legacies, but if the debts require more than the sacrifice of the pecuniary legacies, they abate inter se. If one makes a will, and then a codicil, and gives legacies by both, on a deficiency they shall all come into average; but if one gives legacies, and apprehending there will be a surplus, gives further legacies out of the surplus, by his will or codicil, the legacies first given shall have the preference[m].

Of interest. If a legacy be made payable on a certain day, and nothing is expressed about interest, it is a general rule that the interest shall commence only from the time it is payable, though the legacy may vest from the death of the testator, so as to be transmissible to the legatee's representatives, in case he dies before it is payable[n]. If the legatee die before the time of payment, as if it be made payable to the legatee at twenty-one, and he die before twenty-one, his representative must wait till he would have attained twenty-one if he had lived, unless it were directed by the will to be paid with interest[o]. Where no time is appointed for the payment of a legacy, it is not necessarily payable till the expiration of a year after the testator's death, that being the time allowed the

[m] Attorney General v. Robins, 2 P. Wms. 23.
[n] 2 P. Wms. 481. notes. 3 Vez. Jun. 10. 4 Vez. Jun. 1.
[o] 4 Vez. Jun. 345.

executor for getting in the effects; and therefore, in such a case, interest does not begin to be payable till the year is expired[p]. The old doctrine that the payment of interest should depend upon the funds' being productive or barren, is exploded; and now, although the testator's property consists of stock producing a certain and regular interest, yet if the will is silent about interest, none will arise upon a legacy given by him, till the end of the year after his death[q].

This general rule of giving interest to the legatee, from the expiration of the year, is not to be extended or contracted upon slight inferences of intention; nor will it yield to the impossibility of getting in the personal estate, so as to pay the legacy within the year allowed for that purpose. And even though the legacy is to come out of a part of the testator's estate, which cannot be recovered for a long time after the year, and the testator directs the legacy to be paid, when the money, which is to constitute it, can be recovered; still the payment of interest, if practicable, or at least the computation of it, will commence from the end of the year after the testator's decease. The judgment of Sir W. Grant in the case of Wood *v.* Penoyre[r], exhibits the law on this subject with so much clearness, that the reader will not be sorry to find it stated in this place.

Thomas Tolson by his will, dated the 9th of May, 1788, after payment of his debts, gave to the defendants Penoyre and Rood the sum of 6000*l.* secured to him with interest at 5*l.* per cent upon a mortgage of

[p] 2 P. Wms. 26, 27. [q] 7 Vez. Jun. 97.
[r] 13 Vez. Jun. 325.

the estate of Sir Lucius O'Brien, in the county of Clare in Ireland, and all his legal and equitable interest in the said mortgage; upon trust to carry on the suits depending in Ireland for recovering the said money, in case it should not have been paid in the testator's life; and to pay and apply the said money, when recovered, in the manner hereinafter mentioned. The testator afterwards gave the following, among several other legacies:

"Also, I give to my said trustees the sum of 2500*l.* "to be paid within six months next after my decease; "and also the further sum of 2500*l.* to be paid out of "the money due on the Irish mortgage when the "same shall be recovered;" upon trust to place out the said two sums upon government or other good securities, and pay the interest or dividends to the testator's niece Elizabeth Holland for life, for her separate use; and after her decease to divide the trust-money among her younger children equally.

"Also, I give and bequeath the several legacies to "the several persons hereinafter-mentioned, (that is "to say,) to my niece Elizabeth Wood, the sum of "100*l.* and to each of her four children 100*l.* to be "paid as soon as may be after my decease; and also "to each of her said children the further sum of 900*l.* "to be paid out of the money due on the Irish mort-"gage when the same shall be recovered."

A great number of legacies followed; and then this clause; "and I direct that the legacies hereinbefore "given to my servants, and all other legacies not ex-"ceeding 100*l.* each shall be paid immediately after "my decease, and the other legacies, with those given

" to charitable uses, within six months next after my " decease."

The MASTER of the ROLLS.

My first impression upon this case certainly was, that the words " where the same shall be recovered," had the effect of postponing the time of payment, and consequently the right to interest, until the mortgage debt, out of which the legatees were payable, should have been actually received and got in. But upon farther consideration of the cases, applicable to this subject, I am satisfied, these words mean, and therefore ought to receive, a different construction.

Wherever legacies are given out of personal estate, consisting of outstanding securities, those legacies cannot be actually paid, until the money due upon such securities is actually got in: but by a rule that has been adopted for the sake of general convenience, this court holds the personal estate to be reduced into possession within a year after the death of the testator. Upon that ground interest is payable upon legacies from that time, unless some other period is fixed by the will. Payment may in many instances be actually impracticable within that time: yet in legal contemplation the right to payment exists, and carries with it the right to interest until actual payment. In the cases of Entwistle *v.* Markland, and Sitwell *v.* Bernard [a], it was determined that the reference by the testator to the time, at which his personal estate should be got in, does not, without the most plain and distinct indication of his intention, af-

[a] 6 Vez. Jun. 520. and notes to the case.

fect the legal presumption, that the personal estate may be got in within a year from the testator's death. In both those cases all that the plaintiff was entitled to, according to the strict letter of the will, was to have an estate for life in such lands as should be purchased with the produce of the personal estate, when it should be received and got in. It was admitted on all sides in both those cases, that there were large portions of the personal estate, that could not by any diligence of the executors have been possibly reduced into possession within a year from the death of the testator; and yet it was held, that the whole for the purpose of the question then before the court was to be considered as having been reduced into possession at the end of the year from the testator's death; so as to entitle the tenant for life to interest upon the whole fund; as if it had been actually realized, and actually capable of being laid out in land.

These cases shew, that the actual delay of payment is not necessary, in order to found the claim of interest. If the executors in either of those cases had been called upon by the tenant for life to purchase an estate, in order that he might enter into the enjoyment and the receipt of the rents and profits, they would have had just the same answer to give, which the executors and trustees in this case say they would have given, if they had been called upon to pay, before the money due upon the mortgage was received: for they would have said in those cases respectively, it was impossible for them to purchase land; for they could not with due diligence have got in the personal estate, with which that land was to be purchased. So, the executors in this case say, the legatees could not have had their legacies, if a bill had been filed; as

the mortgage out of which they were payable, was not received. But it was held that the possibility of purchasing, in fact, does not determine the question, whether, according to the legal presumption the purchase might not have been made. So the possibility in this case does not determine, whether by legal presumption the mortgage might not have been called in within a year. I cannot, without rejecting the authority of those cases, hold, that the mortgage, though not actually capable of being called in, is not to be considered as having been got in within the year. Constructive receipt is held equivalent to actual receipt for the purchase of the right to interest. There is no doubt a testator may exclude the rule of the court, by plainly indicating an intention inconsistent with it; and in Gaskell *v.* Harman [t], and Elwin *v.* Elwin [u], it did seem to me, that the anxiously marked intention would have been completely disappointed, if in one of those cases I had taken the personal estate to have been received or ascertained; or, in the other, if I had held the real estate to have been sold, at any other period, than that at which those events respectively took place in fact. But in Entwistle *v.* Markland, and Sitwell *v.* Bernard, the court seems to have decided, that such words as "when received," "when got in," "when recovered," "when laid out," do not so clearly mark the intention as to preclude the application of the legal presumption; and I have found a case in Ambler, which, though it is not fully stated there, yet by the register's book establishes the same principle. That case is Hambling *v.* Lyster [x]. From the register's book I find that the executors in their answer

[t] 6 Vez. 159. 11 Vez. 489. [u] 8 Vez. 547.
[x] Amb. 401.

stated, that they had laid a case before Mr. Wilbraham upon two questions: 1st, whether the receipt of the money, due upon the mortgage, by the testator himself, was an ademption of the legacies given out of it: 2dly, supposing those legacies not adeemed, whether the legatees had a lien upon the new securities in which the money received upon the mortgage had been laid out. Mr. Wilbraham's opinion was, that there was no ademption; but likewise, that the legatees had no right to follow the money laid out in the new securities. That was a material point; as it appeared, the estate was not sufficient for all the legacies. One question therefore was, whether those legatees were to abate with the general legatees, or were to be paid by preference out of the securities, upon which the money, that had been received by the testator, had been laid out. The Master of the Rolls agreed with Mr. Wilbraham upon the first point: but differed from him upon the second; for the decree says, that so much of the money, so compounded for, and received and placed out again by the testator, is still to be considered as a fund for the satisfaction of the plaintiff's legacies; and as the money, due upon two bonds specified, was the readiest for the plaintiff's satisfaction, that money was directed to be called in forthwith, and payment was decreed with interest from the end of one year after the testator's death, and costs were given out of the money so received; and, if the said money should not be got in, or should not be sufficient for the plaintiff's satisfaction, liberty was given to apply.

In consequence of Mr. Wilbraham's opinion, an apportionment had been made of the whole estate; and 32*l.* had been apportioned to the plaintiff for his

legacy of 100*l.* He refused to accept that; and was held entitled to satisfaction out of the specific security. Then, as the new securities were held to be substituted for the former, it is clear, all the words of the will must have been as applicable to the one as to the other; and the legatee could have no claim upon the one set of securities except in the same mode as he had a claim upon theother; that is,—to be paid out of the securities, when the money due upon them should be received, and the decree accordingly follows the words of the will "when received." But that did not prevent interest running from the death, several years before it was received.

So the opinion of the court is, that the words "when received" did not suspend or postpone the right to interest.

Therefore, upon these authorities the legatees in this case are entitled to interest at the rate of 4 per cent from the death of the testator.

Where the legatee is the child of the testator, the court will order interest to commence immediately, although the legacy is payable at a future day; since a parent is bound by the law of nature to provide a present maintenance for his own child[y]; and it seems it was Lord Alvanley's opinion, when Master of the Rolls, that illegitimate children were to be admitted to the same benefit[z]; though Lord Hardwicke held a contrary opinion, on the principle of law, which recognizes no relationship in such a child[a]. And Lord

In favour of a child interest will commence immediately

Who is a child within this privilege.

[y] 3 Vez. Jun. 13. 3 Atk. 60. 102.
[z] 3 Vez. Jun. 12.
[a] 1 Vez. 310.

Eldon seemed to think that there ought to be something to shew that the testator means to put himself in loco parentis[b]. Lord Alvanley was also of opinion, that a grandchild was to be comprised within the exception out of the above-mentioned general rule, and was to be put upon the same footing with a child in this respect[c]; and the court of chancery has in subsequent cases confirmed that opinion[d]. But this favour does not extend to a nephew[e].

Where a legacy is left to an infant, payable at 21, and bequeathed over on his dying before that age, and his death happens before his arriving at that age, the accumulated interest shall go to the representative of the deceased, and not to the remainder man[f]. And where a father is living, and able to maintain his child, to whom a legacy is bequeathed, it has been held that the interest of the legacy shall not be applied to his maintenance during his nonage[g]; but where the father is incompetent to maintain his child, he shall be maintained out of the interest of his legacy, whether it be vested or contingent, and although the legacy be bequeathed over on the infant's dying before 21[h].

When the occasion is very pressing, the court will sometimes break in upon the principal, but this

[b] 6 Vez. Jun. Perry *v.* Whitehead. and see 4 Vez. Jun. De Mazar *v.* Pybus.

[c] 3 Vez. Jun. 12. [d] 5 Vez. Jun. 194.

[e] 5 Vez. Jun. 12.

[f] 2 P. Wms. 421. note 1. 1 Bro. C. R. 82. 335. 3 Atk. 59.

[g] 3 Atk. 60, 399.

[h] 3 Atk. 60. 2 P. Wms. 21., and see Cas. Temp. Lord Redesdale, Ellis *v.* Ellis, and note, and see also 3 Vez. Jun. 16. as to the wife in such cases.

is seldom and cautiously done[i]; and it seems this can on no account be done, if the legacy be devised over on the infant's dying before he comes of age[k]. whether legacies are charged on real or personal estate, it is become the established practice of the court to allow only 4 per cent. where no interest is directed by the will[l]; although the fund may produce more[m].

If an annuity be given by a will without specification as to the times of payment, it shall commence in computation from the testator's death, and consequently the first payment shall be made at the expiration of the year after that event; but if a sum be directed to be placed out to produce an annuity, whether that is to be considered as a legacy payable at the end of the year, and to begin in computation only from that time, or as an annuity commencing from the testator's death, seems not to be fully settled[n].

Where the legacy is to an infant, how to be paid.

An executor used often to be embarrassed how to dispose of a legacy bequeathed to a minor. He runs a risk in paying it to the father, or any other relation of the infant, without the sanction of a court of equity[o]. But by the act of 36 Geo. 3. c. 52. s. 32. it is enacted, that where, by reason of the infancy of any legatee, the executor cannot pay the legacy, it shall be lawful for him to pay such legacy, after deducting the duty payable thereon, into the bank of

[i] 4 Bac. Abr. 433. 3 Bro. C. R. 178. 2 P. Wms. 21. 1 Vern. 255.

[k] 4 Bac. Abr. 412. [l] Sitwell v. Bernard, 6 Vez. Jun. 520.

[m] 4 Bac. Abr. 410. 2 Bro. C. R. 47. 3 Bro. C. R. 53. and see Sitwell v. Bernard, 6 Vez. Jun. 520. [n] 7 Vez. Jun. 96.

[o] 4 Bac. Abr. 429. 1 Eq. C. Abr. 300. 3 Bro. C. R. 96, 186. 4 Burn. Eccl. C. 321.

England, with the privity of the accountant-general of the court of chancery, to be placed to the account of the legatee, for payment of which the accountant-general shall give his certificate, on the production of the certificate of the commissioners of stamps that the duty thereon has been duly paid; and such payment into the bank shall be a sufficient discharge for such legacy; and when paid it shall be laid out by the accountant-general in the purchase of 3 per cent. consolidated annuities; which, with the dividends thereon, shall be transferred or paid to the person entitled thereto, or otherwise applied for his benefit, on application to the court of Chancery by petition, or motion, in a summary way. But the executor is not bound to pay the legacy into the bank till the expiration of a year after the testator's death.

SECTION IX

Of Distribution by an Administrator.

AS far as regards the collection of the effects, and the payment of the debts, of the deceased, the office of the administrator corresponds with that of the executor. And if there be a will without the appointment of an executor, then the administrator with the will annexed, of whom mention has before been made, is in the place of an executor, and has the same duty to perform in respect to the legatees. But for the

duties of an administrator, appointed by the ordinary, in respect to the surplus property of an intestate, after the funeral, and testamentary charges and debts are discharged, we must look to the several positive provisions of the legislature, by which the distribution thereof has been directed and regulated.

Distribution under the statutes of distribution.

The distribution, according to the statute, should be in the manner following: "One third part to the wife of the intestate, and all the residue by equal portions among his children, and such persons as legally represent such children, in case any of them be then dead, other than such child or children (not being heir at law,) as shall have any estate by the settlement of the intestate, or shall have been advanced by him in his life-time, by portion, equal to the share, which shall by such distribution be allotted to the other children, to whom such distribution is to be made; and in case any child (other than the heir at law,) shall have any estate, by settlement from the intestate, or shall have been advanced by him in his life-time by portion, not equal to the share which will be due to the other children by the distribution; then so much of the surplusage shall be distributed to such child as shall have any land by settlement from the intestate, or was advanced in the life-time of the intestate, as shall make the estate to be equal, as near as can be estimated; but the heir at law, notwithstanding any land that he shall have by descent, or otherwise, from the intestate, is to have an equal part in the distribution, with the rest of the children, without any consideration of the value of such land. But in case there shall be no children, nor any legal representatives of them, one *moiety* of the estate shall be allotted to the wife of the intestate, and the residue of

the same shall be distributed equally among every of his next of kindred, who are in equal degree, and those who legally represent them.

No representations shall be admitted among collaterals, after brothers' and sisters' children: and if there be no wife, then all the estate shall be distributed equally among the children; and if no child, then among the next of kindred to the intestate, in equal degree, and their legal representatives." For the benefit of creditors, no such distribution of the goods of an intestate shall be made, till after the expiration of one year from his death. And every one, to whom any distribution and share shall be allotted, shall give bond, with sufficient sureties, in the spiritual court, that if any debt, truly owing by the intestate, shall be afterwards sued for and recovered, or otherwise duly made to appear, that then, and in every such case he shall refund, and pay back to the administrator, his rateable part of that debt, and of the costs of suit, and charges of the administrator, by reason of such debt, out of the part and share so allotted to him, thereby to enable the administrator to pay and satisfy the debt, so discovered after the distribution made.

The statute contains exceptions expressly saving the customs of the city of London, and the province of York.

Posthumous children, and those of the half blood, equally entitled.

Posthumous children are equally intitled with those born in the life-time of the intestate. And no difference is made between the half and the whole blood, but they are equally entitled, as being of equal propinquity *to* the deceased; and if there be but one

child and a widow left by the intestate, the widow takes her third, and the other two thirds will go to the child; and if no widow, then the one child will take the whole. If all the children be dead, the children which they or any of them may have left, will take equal shares, as next of kin, in their own right, and not by way of representation. But if some of the children be living, and others dead, leaving children, the children of the deceased child take the share of their respective parents, by representation, and not in their own right; thus, if A. have three sons, B., C., and D., and B. die, leaving four children, and C. die, leaving two children, on the death of A. intestate, one third will go tó D. another third to the four children of B. and the remaining third to the two children of C.

It is plain, under this statute, that the younger child cannot take any benefit of the distribution, unless he first bring into the general mass of the testator's property whatever estate in land or pecuniary portion he has received from the intestate, in his life-time, by way of advancement, by settlement, or otherwise; and this is called bringing the same into hotchpot, from which obligation, however, the heir at law is specially exempted. The advancement of a child so brought into hotchpot, is for the benefit of the children only, exclusively of the widow[a]. And it is to be observed, that if a child, after receiving such advancement, shall die in his father's life-time, the representative title of the grandchildren cannot be enforced, unless they first bring in the advancement of their parent[b]. Though the heir at law shall not account

Of advancement and bringing into hotchpot.

[a] Prec. in Chan. 182. [b] 2 P. Wms. 560.

Of the privilege of the heir in this respect.

for the land, which came to him by descent, or otherwise, from the intestate; yet any advancement out of the personal estate, (1) must be brought in by him, as well as the other children, before he can be entitled to a distribution, under the statute[c]; and the same obligation extends to coheiresses[d].

Every species of substantial provision is within the meaning of advancement under the statute, as the purchase of an advowson, or any office or commission[e], the settlement or gift of a marriage portion, lands or interest in lands[f], annuities, reversions, and gifts in futuro[g], or on contingency[h], (such being capable of a valuation,) and even provisions which are not to take place in the father's lifetime[i].

But the advancement must be by an act in the lifetime, complete as to the property, though it may not take effect, or be intended to take effect, till after the death of the intestate. A provision therefore by will where a testator dies intestate, as to part of his personal estate, is not considered an advancement with respect to that part[k]. Neither is land given by the father's *will*[l] to a younger child, or what a child de-

[c] Fitzg. 285. [d] 2 P. Wms. 240.
[e] 3 P. Wms. 317. not. (o) [f] 2 P. Wms. 441.
[g] 2 P. Wms. 445. [h] 2 P. Wms. 442.
[i] 2 P. Wms. 440. [k] 2 P. Wms. 240.
[l] Id. ibid.

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(1) The bequest of a shilling to an eldest son, in satisfaction of all claims, was decreed sufficient to exclude him from his distributory share of the testator's personal estate, not disposed of. Acherley *v.* Vernon, 10. Mod. 524.

rives under his *mother* [m], to be considered as an advancement within the meaning of the statute.

It is scarcely necessary to say that the property given to a child by any other than his parent, or what he shall acquire for himself, does not come under the description of advancement. Lands descended to the heir at law, or to the heir in Borough English, are privileged from being brought into hotchpot; for the statute speaks only of such estate as a child has by settlement, or by advancement of the intestate in his lifetime [n].

Of the title of the father and mother of the intestate.

The title to take as next of kin under the statute, is to be traced by the same rules of consanguinity as the title to administration. In case, therefore, of no children, nor any issue of children, the father becomes entitled to all the surplus in exclusion of the brothers and sisters of the deceased: but the *mother*, by the statute 1 Jac. 2. c. 17. s. 7. comes in only with the brothers and sisters, each of them being entitled to an equal share with her. If, therefore, the intestate have left a widow, a mother, and brothers and sisters, the widow is entitled to a moiety, and the residue is equally shared between *the mother* and the brothers and sisters of the deceased; and in case any deceased brother or sister have left children, such issue will take the share their parent would have been entitled to if living. But representation, under the statute of distributions, is restricted among collaterals to the children of the brothers and sisters *of the testator*. It has, therefore, been held, that if an intestate leave an uncle and the child of a deceased aunt, the sister of

[m] 2 P. Wms. 356. [n] Cas. Temp. Talbot, 276.

the uncle, such child shall have no distributive share with the uncle[o].

Grandfathers, and grandmothers, uncles, aunts, nephews, and nieces.

Grandfathers and grandmothers, though in equal degree of consanguinity with brothers and sisters, shall have no share with them in the distribution[p], but come next in order; and next to them are the uncles and nephews, aunts and nieces, who are all in equal degree, and take per capita: and it is to be observed, that dignity of blood makes no difference in these titles; so that where the next of kindred are a grandfather or grandmother by the father's side, and grandfather or grandmother by the mother's side, their claims are equally respected[q].

Of the vesting of the distributive share.

The statute suspends the distribution till a year after the death of the intestate; but this is no suspension of the vesting in the next of kin, who have survived the intestate, so that if any such die before the year, their representatives are entitled to their distributive shares[r].

Where a bastard dies intestate.

As a bastard can have no kindred, his effects, on his dying without a will, belong to the king, who, on proper application, usually grants them, by letters patent to the nearest natural connection; upon the strength of which such persons obtain, as of course, a grant of administration from the Ecclesiastical Court, which entitles him to the sole enjoyment of the personal property[s].

The distribution of an intestate's effects is regu-

[o] 1 P. Wms. 594.
[p] 1 P. Wms. 53.
[q] Dougl. 542.
[r] Amb. 191.
[s] 3 Bac. Abr. 75.

lated by the law of that country which may be properly called his home or domicile; but the actual place where he happens to be at the time of his death, though presumptively his domicile, may, by circumstances be shewn not to be so; for an occasional or temporary residence will not constitute such domicile so as to subject his property to the local laws with respect to its distribution[t].

SECTION X.

Of Distribution by the Custom of London

THE restraints which these customs formerly imposed upon the *testamentary power* have been removed by several statutes; yet as to the property of an intestate they remain in full operation. If a freeman of the city of London die, (and it is of no consequence where, or whether he resided or left any property within the city,) leaving a widow and children, (although such children were not born in the city,) his personal property, after deducting the widow's apparel and the furniture of her bed-chamber, (1) which is called the widow's chamber, is divided into three parts, one of which belongs to the widow, another to the children,

[t] Amb. 25. 415, 416. 2 Vez. Jun. 198.

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(1) If the intestate's property exceed 2000*l.* it is said the widow is entitled to 50*l.*

and the third to the administrator, *in that character.* If there is only a widow, or only children, they respectively take one moiety, and the administrator the other[a]; if neither widow nor children, the administrator takes the whole[b]. That which belongs to the administrator is called the dead man's part, because formerly it was to be expended in masses for the soul of the deceased; but by the stat. 1 Jac. II. c. 17. the administrator's part has been made subject to be distributed, as in the common cases. The custom has nothing to do with the next of kin, but is confined to the wife and children of the intestate, not even extending to his grandchildren[c]. And a posthumous child takes together with the other children[d]. If therefore a freeman die, leaving a widow and grandchildren only, the widow takes her half by the custom, and the other half is to be distributed under the statute, in the proportion of one-third to the widow, and two-thirds to the grandchildren, as the lineal representatives of the deceased children. And if there be nobody within the purview of the custom, as if there be neither wife nor child, the whole will be distributed under the statute.

Of the dead man's part.

Of the widow's chamber.

The privilege of the widow's chamber, like the right to paraphernalia, is postponed to the rights of creditors. A woman may be deprived of all these rights, whether under the custom or under the statute, by an express exclusion in her marriage settlement[e]; or by a divorce in the Ecclesiastical Court for adultery[f]. The share of a child, where the intestate has

[a] 1 P. Wms. 340. [b] 2 Show. 175.
[c] 1 P. Wms. 541. [d] Prec. in Ch. 499.
[e] 1 Eq. C. Ab. 153. 1 P. Wms. 531. [f] Bunb. 16.

left other children, under the custom, *does not vest* until the age of 21; so that he cannot dispose of it by will until that age: and if after that age he dies intestate it goes according to the statute. If he die under that age his share survives to the other children[g]; differing in this respect from the share under the statute, which vests in the children upon the death of the intestate, and which they are competent to devise by their wills at the period when the general disposing capacity arrives.

Of the vesting under the custom.

What has already survived under the custom, does not survive again, but will go according to the statute[h]. Where there is but *one* child, his orphanage part vests in him upon the death of the intestate, and may be devised by him at the same age at which he is competent to dispose of personal property by will[i]. And it is said that if an orphan daughter marries under 21, her orphanage share is prevented from surviving if she dies under that age[k]. If a freeman have one or more children, and he advances him, her or them or any of them, in his lifetime to the full extent to which the benefit under the custom would extend, the custom so far is satisfied, but the widow may still take her customary share, and the rest is distributed according to the statute[l]. But if the advancement is only in part, such advanced portion must be brought into hotchpot before any advantage can be taken under the custom. Such portion, however, is only shared with the other brothers and sisters, this rule of equality not extending to the benefit of the widow[m]. And

Of advancement under the statute.

[g] Prec. Ch. 537. [h] Prec. Ch. 537.
[i] Prec. Ch. 207. [k] 1 Vern. 88.
[l] 2 P. Wms. 527. 1 Atk. 54. [m] 1 Vern. 345.

if there be an only child so partially advanced, he shall take under the custom his full orphanage part, without accounting with the widow for his advancement[n].

Where the portion so advanced exceeds the child's share under the custom, it seems settled, that after covering the orphanage part, to which *it is first applicable,* such excess ought to be brought into hotchpot, with all the persons entitled under the statute to the distributable part; except, it is said, where the advancement has been *given and accepted expressly* in satisfaction of the customary share, in which case, in the distribution of the dead man's part, no regard is to be had to the advancement, it being considered as a sort of purchase by the child[o].

The advancement must be wholly out of the personal estate: the custom takes no notice of real property: therefore, a settlement by a freeman of real estate on his child, will not affect his right under the custom[p]; even though it be made in express exclusion thereof; and money given to be laid out in land is considered as real estate to this purpose[q]. The provision must always come from the father; it must be made by him in his *life-time*, and be out of his *personal* property[r]. Nor will every gift by the father so operate. Monies applied in maintenance and education, and perhaps in putting out apprentice, are not considered in the light of advancements, under the custom, any more than under the statute, though the last mentioned case is questionable[s].

[n] 2 Salk. 426.
[o] 4 Burn's Ecc. L. 207.
[p] 1 Vern. 2. 216.
[q] 1 Vern. 345.
[r] 1 Vern. 61. 89.
[s] 1 Atk. 403.

We have observed, that if a child be advanced above his or her share under the custom, whether such excess shall be brought into hotchpot or not, will depend upon the question, whether the provision was or was not expressly made in satisfaction of the orphanage part. If made expressly in satisfaction of the orphanage part, it would be regarded as a sort of purchase; for it might have been less by the event. It is accordingly held, that if, upon the marriage of a freeman's daughter, at 21, the father settles a provision upon her, which she accepts in lieu of her orphanage part, equity will give effect to such agreement against the custom[t]. And if a man marry a freeman's daughter under age, he may release, or covenant to release, all future interest, in right of his wife, under the custom of London[u].

Section XI.

Of the Distribution by the Custom of York.

THE custom of York agrees with that of London, except in the following particulars. The orphanage part vests in the child immediately on the death of the intestate[a], instead of waiting for the age of 21. Real

[t] 2 Eq. Ca. Abr. 272.

[u] 1 Atk. 63.

[a] 4 Burn's Ecc. L. 398.

estate, however small the value, in comparison of the personal estate, if it comes by descent, or by limitation in a settlement made on the father's marriage, and whether in fee or in tail, in possession or reversion, excludes the claim to the filial portion, under the custom[b]. It is to be observed also, that the custom of York will not attach, unless the intestate was resident within the province at the time of his death; but as this is not necessary under the custom of London, this latter custom controuls that of York, so that if a freeman of London die in the province of York, no inheritance in land shall preclude him from his share of the personal estate, by the custom of the city, which always follows the person[c]. Under both customs the locality of the property is immaterial.

For the convenience of the reader, an hypothetical list of cases, shortly stated and answered on this subject, shall be laid before him, which, with a little attention, may enable him at once to see the interests of parties, under the statute, and the custom above treated of, either distinctly considered, or in combination.

By the statute of distributions, 22 and 23 Car. 2. made perpetual by 1 Jac. 2. c. 17. the custom is saved, as well as to London and other places. These statutes work a distribution of the *pars rationabilis*, or, as they call it in the province of York, *the death's part;* in every other respect the custom remains unaltered.

[b] 4 Burn's Ecc. L. 409. [c] 4 Burn's Ecc. L. 416.

By the custom of the province of York:

The death's part.	When a wife and children.	Third
	When children and no wife, wife and no children, wife and heir, wife and co-heirs, wife and all advanced	moiety.
	When neither wife nor children, altho' grandchildren; no wife, and an only child, heir, or children, co-heirs, or all advanced - - - -	The whole.
Widow's part.	When a child or children, not heirs - - - -	Third
	When a child or children, heirs, no children, a child advanced, all advanced	moiety.
Child or children's part.	No widow, another child, heir, or advanced, all the rest advanced	moiety.

The heir at law has no share, by virtue of the custom, but has a share of that part of the estate of his father, dying intestate, called the death's part, according to the statute aforesaid.

Children advanced. All the children advanced in the father's life-time are excluded by the same custom; and also by the statute, save when there are no

other children; in which case they each respectively succeed as next of kin.

And observe that the said custom hath relation to, and doth respect, only widows and children.

The widow of an intestate succeeds both to her widow's part in the thirds, or moiety of the clear surplus, according to the custom; and also to her thirds, or moiety of the death's part, according to the statute; and this she demands in the first place, and before the children can make any claim whatsoever.

The remainder of the death's part is by the same statute distributed amongst the children, the heir included, and in part advanced. And the remaining third, called the child or children's part, is by the same custom equally to be divided amongst them, excluding the heir. But the child in part advanced, claiming out of the last mentioned part his equal share, may throw in what he has received in part, and then the whole is equally to be divided.

N. B. The half blood is intitled to the same shares and privileges as the whole blood, in all the cases following, without any distinction.

CASES.

Case of an intestate's leaving a widow, child, or children, none advanced, and no heir.

One third is allotted to her as her widow's part, share, or thirds, due to her by virtue of the custom of the province aforesaid; another third is due to children, equally to be divided amongst them, as their filial parts, and child's portions by the same custom; and the third and last remaining part, commonly called the death's part, is to be distributed according as the

said statutes do direct, viz. one third to the widow, and the remaining two thirds to the said child, or amongst the said children.

One third is due to the widow, by the said custom, one third to the children, the heir being excluded by the said custom, from claiming any share; but the remaining third is to be divided in manner following, viz. one third to the widow, the rest among the children, including the heir, by virtue of the statute. Widow, children, heir.

A moiety due to the widow by virtue of the custom, remaining moiety one-third to the widow, the rest to the child by virtue of the statutes aforesaid. A widow, and a child being an heir.

A moiety is due to the widow as her share by the custom; of the remaining part one third to the widow, and the rest among the co-heiresses. Widow, three daughters co-heiresses.

One third of the whole is due to the widow as her share by the custom; and further, one third of the death's part by the statute, and as to the rest the child in part advanced, must put what he has received in hotch-pot and then the whole is to be equally divided between them. Widow, one child unadvanced, one in part advanced.

A third is due to the widow by the custom, and further one third of the death's part, all the rest is the child's. Widow, one in part advanced.

Half to the widow, of the remainder, one third to the widow, the rest to the child. Widow, one advanced.

One third is due to the widow by the custom, and one third more as her third of the death's part, the re- Widow, one unadvanced &

one in part advanced, an heir.

mainder of the death's part is equally to be divided among all the children, whereof the heir is to be one, according to the statute; as to the remaining third part of the whole, called the children's part, the child in part advanced must put what he has received into hotch-pot, and then the whole is equally to be divided amongst them; the heir being excluded from this part according to the custom of the province.

Widow, one in part advanced, and heir.

One third is due to the widow by the custom, and further one third of the death's part; the remainder of the death's part to be divided equally between the children, by virtue of the statute; but as to the child or children's part, the heir having no title to it, it is all due to the child though in part advanced.

Widow, one unadvanced one in part advanced, heir and grand-children.

The widow must first have one third of the whole clear residue, and further one third part of the death's part, according to the statute; the remainder of the death's part is also distributed by the said statute amongst the children, heir, and grandchildren, in four parts, in manner following, viz. one fourth to the child unadvanced, one fourth to the child in part advanced, one fourth to the heir, and one fourth to the grandchildren, as representatives of their father. But as to the remaining third, called the children's customary part, the child in part advanced may put thereto what he has received; and then the whole must be equally divided between the unadvanced and the in part advanced children, (the heir and grandchildren having no right by the custom,) and the advanced are always excluded; yet the heir, though advanced, has a share in the death's part.

Widow &

A moiety is due to the widow by custom, half the

remaining moiety to the said widow, and the rest among the grandchildren, as next of kin by the statute. grandchildren.

Half is to go to the widow, and half the remaining half to the widow, the rest to the next of kin, all equally amongst them, viz. a moiety as their due share by the custom, and the remainder of the death's part to be distributed in like manner, by act of parliament. Widow & no children

One moiety amongst them equally to be divided as their share, due by the custom, (excluding the heir,) the remaining part being the death's part, is to be divided in like manner, including the heir, by virtue of the statute. Children and no widow.

All to him or her as next of kin. One child and no widow.

One moiety to the child unadvanced, as his customary share; the remaining moiety equally to be divided between them by the statute. One child unadvanced and an heir.

All to the heir, the advanced having had his full share, and therefore excluded, both by the statute and the custom. One advanced, and heir.

All to the unadvanced, for the reasons aforesaid. One advanced, & one unadvanced.

All to the one in part advanced. One advanced and one in part advanced.

All must be put in hotch-pot, and equally distributed between them. One in part advanced, & 2 unadvanced.

A moiety, being the child or children's part, is due Heir, and

one in part advanced.

to the child, although in part advanced, (the heir having no title to the children's part, by the custom,) but the other moiety being the death's part, is equally to be divided between them by the statute.

Heir, one in part advanced, & one unadvanced.

One moiety is the child or children's part, by the custom, (excluding the heir,) but he in part advanced must put what he has into hotch-pot and then the said child's part must be divided between them, and the other part being the death's part, must be equally divided amongst them, including the heir, by virtue of the statute.

Three daughters, coheiresses

Equally amongst them, by virtue of the statute.

One child, heir, & unadvanced.

All to him as next of kin.

Three coheiresses, one being advanced.

All must be equally divided between them, without any consideration had of the advancement by the statute.

A daughter, grandchildren, by a son, (the heir) advanced.

A moiety is due to the daughter by the custom, and the other moiety being the death's part, is distributed by the statute, viz. one moiety to the said daughter, the rest to the grandchildren, as representatives of their father.

Father.

All to him as next of kin.

Mother.

In like manner.

Mother, brother, and sister.

All equally amongst them share and share alike by the statute.

All equally amongst them, but the children are to have shares according to their several stocks or branches from which they are descended. Brothers & sisters, and brothers' and sisters' children.

All equally amongst them, (per capita) they being in equal degree of kindred. Brothers' and sisters' children.

All to him or her, there being neither widow, children, father, mother, brother, sister, or their children. Grandfather or grandmother.

Equally amongst them, as next of kin. Grandchildren.

In like manner. Uncles and aunts.

In like manner. Cousins german.

The custom of London is the same, unless in a case where the eldest son has lands by descent, or by limitation in his father's marriage-settlement, which by that custom is no advancement. *

SECTION XII.

Of the Liabilities, Dangers, and Defaults of Executors.

IT is needless to enumerate among the instances of misconduct in an executor plain acts of embezzling, or consuming his testator's property. The law makes

him also liable in his own property for numerous other less direct modes of wasting the effects entrusted to him. As if he pays debts out of their order, or pays legacies without reserving sufficient to satisfy creditors; or releases the debts of the testator without a satisfaction; or changes the securities for debts; or reduces the estate by submitting to arbitration; or releases an action commenced; or incurs a charge of interest, by delay in the payment of a debt, where he had assets to answer it; or loses the property; or trusts it to an agent who embezzles it; or keeps money in an unproductive state for a length of time; or sells the property much below the value; or delays selling it till it is spoiled or injured, without reasonable excuse for the delay.

But the law attaches to the office of executor a reasonable degree of discretion, without embarrassing it with an unreasonable degree of responsibility. If he invests money in the funds, he will not be answerable on the fall of the stock[a]. He may also call in a debt bearing interest, if he has reason to apprehend the principal to be in danger[b].

He may appropriate the goods of his testator to the amount of what he has expended on account of the testator[c]. And when it has been ultimately for the benefit of the property he has been allowed monies given or released by which an apparent and immediate loss has been incurred[d].

Neither will an executor be charged with the de-

[a] 3 Bro. C. C. 147. 433.
[b] 1 P. Wms. 141.
[c] Dy. 187. b. Plowd. 185.
[d] 3 P. Wms. 380.

fault or misconduct of his companion, if he has not been concerned in it, or contributed to it in any way. But if two executors join in a receipt, and one only receive the money, the general rule is, that both shall be held answerable. (1) Upon this rule, however, the following distinction seems to prevail;—that the act of participation which is to involve one executor in the consequences of his companion's default, must be such as helped him to the commission of it. If, therefore, an executor does an act, by which money gets into the possession of another executor, he is equally answerable with the other, however innocently he may have conducted himself; not so, however, if he is merely passive by not obstructing the other in receiving it. And where an executor receives the money without the consent of his co-executors, and they afterwards join in the receipt for the same, this posterior act, as it did not enable the defaulter to obtain the money, will not, it is said, render them answerable[e]. Upon the whole, an executor is only liable for waste or loss by his co-executor, to the extent of the assets in his hands, unless he has been in any way accessory to the loss or default; nor will one executor be affected by the notice which another has had, and concealed from him[f].

In what acts of his co-executor, an executor is implicated.

[e] 1 P. Wms. n. 1. Ambl. 417. 4 Vez. Jun. 596.
[f] Cro. Car. 603.

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(1) 1 P. Wms. 81. 243. 2 Bro. C. R. 116. 117. and note a difference in this respect between co-executors and co-trustees, among which latter, only the hand that actually receives incurs the responsibility, though all join in the receipt.

If an executor receives money as such, and deposits it bona fide with his co-executor who is a banker of reputation, he shall not be charged with the loss in case of a failure of such banker[g]. And where a co-executor who had proved the will, but never acted in the office, received a bill on account of the estate by the post, and transmitted it immediately to the *acting* executor, he was held not answerable[h].

Of carrying on the testator's trade with the assets.

The case of the executor's carrying on trade with the testator's assets may be considered under two aspects, namely, his carrying it on with the express authority of the testator given by the will, and his carrying it on without such authority. If he carries it on under such express authority, the testator's assets, as well as the property of the executor himself, will be subject to the bankruptcy; but, as between the executor and the testator's estate, his own property will be liable to make good any loss by such trading, though, if the trade turns out to be profitable, the benefit is wholly applicable to the purposes of the will. (2)

[g] 7 Vez. Jun. 197.

[h] 2 Vez. Jun. 678. and see Bacon v. Bacon, 5 Vez. Jun. 331. for cases of excusable loss by executors.

(2) It has been lately held where the executors of a deceased partner continued his share of the partnership property in trade for the benefit of his infant daughter, that they were liable upon a bill drawn for the accommodation of the partnership, and paid in discharge of the partnership debt; although their names were not added to the firm, but the trade was carried on by the other partners under the same firm as before, and the executors, when they divided the profit and loss of the trade, carried the same

Of the consequences of bankruptcy, where the testator's trade is carried on by the executor.

But the testator's assets are not liable, nor will they pass by the assignment of the commissioners where they are specifically distinguishable, if the executor has carried on the testator's trade without any authority from him. And where under these circumstances the testator's assets are not specifically distinguishable, not only the creditors but the legatees of the testator will be let in to prove their demands to the extent of the assets so wasted by the executor in carrying on the trade[i]. If the testator restrict the power of carrying on his trade to a certain part or portion of the assets, specifically distinguishable from the residue, only such assets will be subject to the bankruptcy, while the *whole* of the executor's own property will still be liable[k]. What shall constitute a trading must depend upon the particular construction of the bankrupt laws.

An executor's bankruptcy will not involve his right to act as executor, though for the safety of the property the court of chancery will upon proper application appoint a receiver; and where the assignees of such bankrupt executor have received a part of the monies belonging to the testator's estate, it will direct the bankrupt to be received in his character of executor as a proving creditor against his own estate, but will order the dividend to be paid into the bank[l].

[i] 10 Vez. Jun. 110. ex parte Garland.
[k] 10 Vez. Jun. 110.
[l] 1 Atk. 101. 213. 2 P. Wms. 546.

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to the account of the infant. Wightman *v.* Townroe, 1 M. and S. 412. They are the legal proprietors in respect of every thing belonging to the trade, and consequently are liable to the legal debts. Ibid. per Bailey J.

The executor of an executor is liable, as such, for the waste committed by his immediate testator.

The statute 4 and 5 W. and M. c. 24. s. 12. enacts, that an executor of an executor shall be liable as such for the waste committed by his immediate testator, which, as being a tort, would at common law have died with the party guilty thereof.

In all cases of debt and contract the liability reaches to the executor who is answerable in his representative character. Whether the debt of the testator arose by record, specialty, or simple contract, it survives against his representative, who sustains the duties, as well as exercises the rights, of the deceased. It is said also that debt will lie against the executor of a sheriff for an escape[m], though an action on the case for the same cause cannot be brought against the executor. Issues forfeited and fines imposed in inferior courts of record, as at quarter sessions, and by stewards in their leets, are said to be recoverable against the representative[n]. So also a relief, or fine due to the Lord of the manor from the testator[o]. Upon breaches of covenant by the testator, where the subject of the contract was valuable and beneficial, as to pay rent, or repair premises, the contract may be enforced against the executor. And whether a contract be under seal, or not, whether it be express or implied, it devolves upon the legal representative, who is equally answerable for a bill or note on which the deceased had incurred an express responsibility, and for such liabilities as arise by implication, and belong to the head of implied assumpsit. Remedies which are given for mere wrongs and grievances, and such as are denominated *torts*, or which imply force, and

[m] Dyer 322. [n] Com. Dig. Admon. B. 14.
[o] Com. Dig. B. 14.

disturbance, such as battery, false imprisonment, trespass upon lands, slander, nuisance, and the like, are within the scope of the rule—actio personalis moritur cum persona.

Sometimes, indeed, by varying the denomination of the action, the difficulty interposed by the above rule may be got over. Thus, although the action of trover will not lie against the executor for a conversion by the testator, because the plea to that form of action is *not guilty*, and so the question is upon the *guilt* of the person deceased; yet if the property was sold by the testator, his executor may be sued in the form of assumpsit, on the liability of the testator for money had and received to the use of the plaintiff. And so in similar cases. The true grounds and criteria of these distinctions will be found in the case of Hambly *v.* Trott [p].

Though the cause of action should not arise upon a contract of the testator, until after his decease, the executor is liable to the extent of the assets, as where money becomes due upon the testator's bond or note after his death [q].

Of the consequences of wasting the testator's assets; or of making a false defence to an action.

An executor by his misconduct may make himself personally responsible, and liable to answer a demand originating with his testator, out of his own property. Thus if he be guilty of wasting the effects of the testator, which in legal language is called a *devastavit*, the judgment in the action against him will be *de bonis propriis* [r]. A false defence, where the falsity must lie within his own knowledge, induces the same

[p] Cowp. 375. [q] Com. Dig. Pleader (2 D. 2.)
[r] 3 Bac. Abr. 77.

consequence to him; as if he pleads a *release* made to himself[s]; or that he never was an executor[t]. In such cases if the plea be found against him, the judgment will be in the alternative *de bonis testatoris et si non, de bonis propriis.*

Where an executor may be held to bail.

Though executors are not in general liable to be held to bail in their representative capacity[x], yet as by wasting the property, they render themselves personally liable, such misconduct is followed also by a liability to be arrested and held to bail[y]. But the suggestion of such a devastavit will not create this liability without the oath of the plaintiff[z]. If the sheriff returns a devastavit to a writ of execution the executor may be held to bail in an action on the judgment[a]. And it seems that wherever an executor has by an actionable promise rendered himself liable in his own person to pay the debt of his testator, he may be compelled to find bail to the action[b].

Of the pleading by executors, and of the judgment and execution against them.

An executor defendant is intitled to be paid costs if the judgment in the action is in his favour[c]. And if he plead a plea which is false, the judgment as to the costs will be *de bonis testatoris si, et si non, de bonis propriis*[d]. But if he plead that he has fully administered, or that he has administered all except, &c. and the plaintiff, admitting the truth of such plea, take judgment of the future assets in the one case, or of the assets admitted in part, and for the residue of assets in futuro, in the other, such defendant executor will not be liable to costs. Nor, as it seems, if he plead

[s] Cro. Jac. 671. [t] 1 Roll. Abr. 930. 933.
[x] 3 Bac. Abr. 101. [y] Ibid. [z] Ibid.
[a] Ibid. [b] 1 T. R. 716.
[c] 3 Bac. Abr. 100. [d] Ibid.

several pleas, as non assumpsit, and plene administravit, and one of them be found for him; but if the plaintiff take judgment on the plea of plene administravit of the assets in futuro, and go to trial on the non assumpsit, and obtain a verdict, he will be entitled to costs[e].

The judgment in common cases against an executor or administrator is for the debt, or damages, and costs to be levied of the goods and chattels of the testator, or intestate, in the hands of the defendant, if he have so much thereof in his hands to be administered; and if he have not, then the costs to be levied of his own proper goods[f]. If the sheriff return *nulla bona* generally, the proceeding may be by scire fieri, or by action of debt on the judgment suggesting a devastavit. On the latter, he may have execution immediately against the defendant in all its different forms of capias ad satisfaciendum, fieri facias, de bonis propriis, or writ of elegit[g]. The form and incidents of the judgment of assets *quando acciderint* may be accurately understood by consulting the authorities in the margin[h].

Since the statute 38 Geo. 3. c. 87. an executor can neither sue or be sued till he arrives at the age of twenty-one; but where there are several executors, and some under age, the action must be against all such as are under age appearing by guardians. If there be more executors than one they must regularly

[e] Tidd. K. B. 896.

[f] Tidd. K. B. 941. 4 T. R. 648. 7 T. R. 359.

[g] Tidd. K. B. 942. 957.

[h] Tidd. Pract. K. B. 1038. et seq. 2 Saund. 226. 1 Vent. 94, 95. 7 T. R. 29.

be all sued together; that is, where they have all administered; but where any have not administered, such need not be joined[i]; the case of plaintiffs executors being in this respect different, for they *must* all join, though all may not have administered. Strangers have no means of knowing who are executors but by their visible acts.

Of the liabilities of husband and wife executrix, reciprocally, for waste done by the other.

The husband of an executrix must be joined in an action against her; but if such action be brought jointly against them, and, a judgment being obtained, the husband die leaving his wife surviving him, no action of debt on such judgment will lie against her suggesting a devastavit of the husband. Nevertheless, if an executrix marry, and the husband be guilty of wasting the goods, this will be also the devastavit of the wife, and both will be answerable[k]. So again, if an executrix commit a devastavit, and afterwards marry, the husband, together with his wife, is chargeable for it during the coverture[l].

Of the consequences of the marriage of an executrix, where the testator is indebted to her; or where her husband is indebted to the testator.

If the testator, being indebted to a woman, make her his executrix, and she afterwards marry, or were married in his life-time, the husband may retain the debt out of the assets; and so if the husband were indebted to the testator, and his wife be made executrix, the debt is released in law, as much as if the wife herself had been the debtor; though if an executrix, after the death of the testator, marry the debtor of the testator, this will be in law a devastavit[m]. These doctrines are consequences of the principle, that, if a married woman be an executrix, or

[i] 1 Lev. 161.
[j] Cro. Car. 510.
[k] Ambl. 162.
[m] Ex. Off. 207.

administratrix, the husband has a joint interest with her in all the effects of the deceased; and is enabled by law to assume the whole administration, and to act in it to all purposes with, or without, the consent of the wife[n]. Nor can the wife do any valid act as such executrix or administratrix, without the husband's concurrence[o]. Nevertheless, if the husband die in her life-time, the right of administration survives to her; and on the other hand, nothing survives to the husband, in case of her death in his life-time; and it is said that, if she make a will, even without her husband's consent, though to all other purposes such will is inoperative, yet it may transmit the executorship in respect to the property so vested in her in auter droit[p].

Although an executor is entitled as such to sue in a court of conscience, he is not liable to be sued there; such a court not being a proper tribunal to take account of assets[q]. An executor may sue, but not be sued, in a court of conscience.

Persons entitled to legacies under a will, or to distributive shares of an intestate's effects, may assert their claims in courts of equity, which can not only give effectual relief, but stipulate terms conducive to general justice, and the conscientious claims of all parties. Equity, as we have seen, not only considers an executor as a trustee, and therefore liable to account upon oath,(3) but in certain cases as trustee for the Of the superior relief in equity against executors.

[n] Com. Dig. D. 4 T. R. 617.
[o] Off. Ex. 207. Com. Dig. D. [p] 2 Bl. Com. 408.
[q] Dougl. 263.

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(3) Guardians and receivers, being bound by recognizance to account regularly, may be obliged so to do on application by pe-

nearest of kin of the undisposed surplus. A bill, therefore, in equity, is the mode of compelling a discovery of assets, as well as an account; and also of calling for a distribution, under the statute, of an intestate's personal estate[r]. And if, without a reasonable cause assigned, an executor detain the effects in his hands for a length of time, or use them in trade, or even keep them idle and unproductive in his hands, he will be called upon for interest in a court of equity[s]. In every case where an executor is made to pay interest for a breach of trust, he is liable, as of course, to costs[t]; à fortiori, where he is convicted of conduct directly and palpably fraudulent; even though the will may have directed his expenses to be paid out of the estate[u]. But where an executor fails in a suit, instituted merely for obtaining the opinion and directions of the court, he will not be subjected to costs[v].

Of the necessary parties to suits.

It is a general rule in courts of equity, that all persons are to be made parties, who are either legally or beneficially interested in the subject matter, and result of the suit. All trustees, therefore, and all executors and administrators, who are considered as trustees in courts of equity, must be made parties to every suit that concerns the subject matter of their trust; as where the suit regards the payment of a legacy, or an annuity, marshalling assets, the payment of debts, or

[r] Com. Dig. Chancery, (3 D. 1) [s] 1 Vez. Jun. 701.
[t] Ibid. [u] 2 Atk. 126. [v] 1 Vez. Jun. 205.

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tition; but there is no regular way of calling an executor to account, but by filing a bill.

distributive shares[w]. So an executor appointed only durante minore ætate, if he have possessed himself of any part of the assets, must be a party to any suit instituted respecting them.

Though an executor before probate, may file his bill, and it is sufficient, if he afterwards takes out probate at any time before the hearing[x], yet in a bill for an account of the personal estate of the deceased, though the person who has a right to administer is made a party, this is not sufficient without an actual administration taken out[y]. But if a sufficient reason be stated in the bill for not bringing an executor into court, as, if he be resident out of the jurisdiction of the court[z], or if the representation be charged to be in litigation in the ecclesiastical court, or the plaintiff do not know who he is[a], it is not an objection that the executor is not a party. Again, in the case of a mortgage in fee, a bill to redeem must make the executor of the mortgagee a party to the suit, as well as the heir at law, because the money is to return to the same fund out of which it came: but in a bill to foreclose the heir of the mortgagor, it is not necessary to make the personal representative a party to the suit[b]; and if a tenant in fee mortgage, by creating a term, the personal representative ought not to be a party to a bill of foreclosure[c]: for though the heir is entitled to have the personal estate applied in exoneration of the real, yet he must enforce that right by filing his bill; and so if the heir pays out of the assets descended the specialty debt of the ances-

[w] Rep. Temp. Finch. 82. [x] 3 P. Wms. 352.
[y] 3 P. Wms. 349. but see Prec. in Ch. 63. 4.
[z] Prec. in Ch. 83. [a] 2 Atk. 51. 1 Vern. 95.
[b] 3 P. Wms. 334. note A. [c] 13 Vez. Junr. 234

tor, it belongs to him to exhibit his bill against the personal representative, to compel the application of the personal estate, in exoneration of the real, but this is not the concern of the creditor.

The above-mentioned rule, however, is not without some exceptions; as where creditors are seeking an account of the estate of their deceased debtor, for the payment of their demands, a few of the whole number are permitted to maintain the suit, in behalf of the rest, who are allowed to come in under the decree [d]. So also, one legatee may sue without the others, who may come in under the decree [e]; yet where the residue of the personal estate was devised to three, it has been held that one could not sue for his part, without joining the others [f]. And so where the residue was limited to one for life, and upon his decease to other persons, remainders over, it was held that all persons interested under the limitations, must be parties to a bill for the payment [g]. But one of the next of kin of an intestate may sue for his distributive share, and the master will be directed to enquire, and state to the court, who are the next of kin of the intestate, and they may come in under the decree; though if it appears by the bill, that the plaintiff knows who are the other next of kin, it seems he must make them parties to the suit.

[d] 2 Vez. 312.
[e] 2 Ch. Ca. 124.
[f] 3 Bro. C. C. 365.
[g] 3 Bro. C. C. 229.

Section XIII.

Of the effect of Promises by Executors and Administrators, to satisfy Claims upon the Estate of the Testator or Intestate.

THE first branch of the 4th section of the statute of frauds 29 Car. 2. c. 3. enacts that no action shall be brought, whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

That to bring the party within the protection of this provision of the statute, he must have been actual executor or administrator, when he made the promise.

It seems proper to premise, that to bring the party within the protection of this provision of the statute, he must be actually invested with the office, at the time of making the promise: he can receive no benefit from it, by acquiring the office after the promise has been made by him; for which, if it were not clear enough upon the words of the statute, the case of Tomlinson *v.* Gill[a] is an authority. As an immediate executor derives all his title from the will of the person he represents, and the interest and of-

[a] Ambl. 330.

fice are completely vested in him, at the instant of the testator's death, his promise is prevented by this statute from binding him personally, though he makes it before probate, which is not the origin but the authentication of his title. But an administrator derives his office and interest from the ordinary, and therefore, a verbal promise by a person, in virtue of his expectation of representing an intestate, is not invalidated by this clause of the 4th section; and though the grant of administration has relation to the time of the intestate's death [b], such relation cannot, it is presumed, affect the application of the statute.

The statute of frauds and perjuries, in superadding the necessity of writing, to give an actionable effect to the promises therein specified, has given no positive virtue to the writing itself, so as to make it a substitute for the consideration necessary to support the promise according to the ancient maxims of our municipal law. The judgment of C. B. Skinner in the House of Lords, in the case of Rann *v.* Hughes [c], is clear upon this point, which arose upon a promise in writing, made by executors, and wherein the Chief Baron, in very clear terms, made it appear, that this branch of the statute, being made for the relief of personal representatives, did certainly not intend to charge them further than by common law they were chargeable. To that judgment, therefore, the reader is referred as a satisfactory argument for this construction of the statute.

The statute has made — To the comments of the Chief Baron it may be added, that there not only exists as much necessity since,

[b] 2 Roll. Abr. 554.

[c] 7 T. R. 350. N. (a.) 7 Bro. P. C. 556. S. C.

as before, the statute for a consideration to support a promise, though made in writing, but the consideration also continues to be an essential part of the allegations in the declaration in an action upon such promise. For the statute has made no alteration in the method of pleading, either by addition or defalcation, so that, as on the one hand the consideration continues necessary to be stated, agreeably to the rule at the common law; so on the other, it is not held to be necessary on account of the statute, to shew by the declaration that the promise was in writing; but it is left to evidence; which last-mentioned point rests upon the general rule, distinguishing between the cases wherein a matter has its *origin* in an act of parliament, and is thereby required to be in writing, and where an act of parliament makes writing necessary to a matter existing at common law; in the latter of which cases the thing need not be shewn in pleading to be in writing, but in the former, it must be pleaded with all the circumstances required by the act[d]. Thus, a will must be pleaded to be in writing, upon the statute of Henry 8. for by that statute the power of devising is, in certain cases, *first* given; and it is by virtue of that act, consequentially enlarged by the statute of 12 Car. 2. that we now exercise the testamentary power over real estate (1). The

no alteration in the mode of pleading, therefore, though the promise is in writing, the declaration must still set forth the consideration; though it is not necessary to shew that the promise was in writing.

[d] 2 Salk. 519. and see 3 Burr. 1890, per Yates Justice.

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(1) It has generally been holden, however, upon the several branches of the 4th section of the statute, that though a plaintiff need not in his declaration shew any note in writing, but that it will be sufficient for him to produce it on the trial; yet that if such promise be pleaded in bar of another action, it must be alleged to

But though the *declaration* need not state the promise to have been in writing, if

result is, that a promise, to charge an executor personally, and in his own right, so as to make him liable to pay out of his own property, must not only be in writing, but founded upon a sufficient consideration in law; which *authentication by writing* must be proved by the production of the writing itself, and which *consideration* must be both proved and stated.

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such promise is pleaded by the defendant, the *plea* should shew it to have been in writing.

be in writing, so as that it may appear to be a contract on which an action will lie. Thus in a case which took place a very few years after the statute was passed, Elizabeth Case *v.* James Barber, Sir Thom. Raym. 450. the plaintiff declared in *indebitatus assumpsit* for 20*l.* for meat, drink, washing and lodging, for the defendant's wife, provided for her at the request of the defendant; the defendant pleaded, that after the making of the promise, &c. and before the exhibiting of the plaintiff's bill, it was agreed between the plaintiff and defendant and one J. B. his son, that the plaintiff should deliver to the defendant divers clothes of the defendant's wife's, then in the plaintiff's custody, and that the plaintiff should accept the said J. B. the son for her debtor for 9*l.* to be paid as soon as the said J. B. should receive his pay due from His Majesty to him as lieutenant of the ship, called, &c. in full satisfaction and discharge of the premisses in the declaration mentioned, and averred, that the plaintiff at the same time did deliver to the defendant the said clothes, and that she accepted the said J. B. the son for her debtor for the said 9*l.* and that the said son agreed to pay the same accordingly; and that the said J. B. afterwards, and as soon as he received his pay as aforesaid, viz. on such a day, was ready, and offered to pay the 9*l.* and the plaintiff refused to receive it, *et hoc paratus*, &c. to which plea the plaintiff demurred, and judgment was given for the plaintiff for two reasons: 1. because it did not appear that there was any consideration for the promise on the son's part: 2. admitting that there *was* a consideration, yet, that by the statute of frauds and perjuries, the agreement ought to be in writing, or the plaintiff could have no remedy thereon; and though upon such an agreement the *plaintiff* need not set forth the agreement to be in writing, yet when the *defendant* pleads such an agreement in bar, he must plead it so that it may appear to the court, that an action will lie upon it, for he shall not take away

But in order to charge the executor or administrator *de bonis propriis,* it is not necessary to aver in the declaration that the defendant has assets, for if the promise be in writing, and supported by a consideration, as forbearance to prosecute, at the request of the defendant (2), the plaintiff, by acquiescing in a

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the plaintiff's present action, and not give him another upon the agreement pleaded.

The case of Villers *v.* Handley, in the Common Pleas, 2 Wils. 49. proceeded upon the same doctrine upon the 3d section of the statute, which enacts, that no leases, estates, or interests, either of freehold, or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall be assigned, granted, or surrendered, unless it be by deed, or note, in writing, signed by the party so assigning, granting, or surrendering the same, or their agents thereunto lawfully authorised by writing, or by act or operation of law. The action was debt upon a bond for 52*l.* 16*s.* against the heir of the obligor; the defendant confessed the bond and debt, but pleaded that he had nothing by descent, but a small cottage in T. except a reversion after a term of 500 years, commencing the 16th of October 1746, then to come and unexpired, and *hoc paratus,* &c. to which plea there was a general demurrer; and for the plaintiff it was objected that the plea was ill in substance, because it was not alleged therein, that the lease for 500 years was *in writing* (according to the book, because it was not by *deed,* which seems to have proceeded upon a mistake of the law; and see the same book, page 26, Farmer on dem. Earl *v.* Rogers) and because if the lease was not in writing, it was void by the statute of frauds and perjuries, and of this opinion was the court, (Clive and Bathurst Justices, being present) and upon this point they gave judgment for the plaintiff.

(2) In William Banes's case, 9 Rep. 93 b. it was clearly held, that the declaration was good enough, without saying that defendant had assets, for it shall be intended *prima facie,* that she had assets. But Coke said, that he conceived the truth to be, that if

What allegations are necessary to be made in the pleadings

possible detriment to himself, by his relinquishment of legal proceedings (for he might at least have obtained a judgment of *assets quando acciderint*) has purchased a title of action upon the undertaking of the defendant. But without such special agreement, in which the executor steps out of his representative character, an action cannot be sustained against an

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in actions on the special promise of executors and administrators.

there had not been any debt, or if there had been a debt, and the executrix had nothing in her hands at the time, she might have given it in evidence. But this last position seems not to be law, according to the cases, see 1 Roll Abr. 24. pl. 33. 2 Lev. 3. Davis v. Reyner, Yelv. 11. Goreing v. Goreing, 1 Vent. 120. Davis v. Wright, Cro. El. 91. Trewinian v. Howell, 1 Vez. 126. Reech v. Kennegac. But it seems clear enough that the executor must be liable, and that there must be an existing debt, otherwise there will be no consideration. An executor so closely represents the person of the testator, that if a man executes a bond, his executors are bound, though they are not named; therefore, in a declaration against the executor upon the bond of the testator, it is not necessary to say that the obligor bound himself and his executors; but if the suit be against the heir, it is a material allegation to say, that the ancestor bound himself and his heirs, and to prove that he did so in fact; for the heir is not bound by his ancestor's bond, unless he be expressly named. If, therefore, the declaration omits to state that the heir was bound, it is substantially defective: and by the case of Barber v. Fox, 2 Saund. 136. it appears that this is such a defect as a verdict cannot cure; for unless it be shewn upon the pleadings that the heir was bound, there will appear to have been no consideration for his promise, and so no sufficient cause of action. Thus also, if the heir promise to pay a simple contract debt of the ancestor, no action will lie upon this promise, in as much as it is without consideration, for the heir is not chargeable upon such debts of his ancestor. Cro. James, 47. Fish v. Richardson. But if an executor promise to pay, in consideration of a consent only by an assignee of a debt not to sue, the promise stands upon a sufficient consideration, 1 Roll. Abr. 20, pl. 11. And so doubtless I conceive the heir,

executor, otherwise than as an executor; and if the action is brought against him in the character of executor, to recover a demand out of the testator's estate, any special promise to pay the testator's debt is a mere *nudum pactum,* if there be no assets, and if there be any, the extent of the promise is measured by the extent of the assets; or, in other words, the promise superinduces no obligation upon the ori-

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under the same circumstances, will be liable, if the debt be founded upon a specialty.

In Forth *v.* Stanton, 1 Saund. 210. there was no allegation of any undertaking to forbear on the part of the assignees; which case was thus—Plaintiff declared that the defendant's testator was indebted to A. who, after the testator's death, assigned the debt to the plaintiff, and appointed him to receive it to his own use; and that the defendant, in consideration that the plaintiff would accept the defendant for his debtor, promised to pay the debt to the plaintiff. And for want of alleging a sufficient consideration for the promise, the declaration was judged insufficient. Upon the principle of the determination in Barber *v.* Fox, cited above in this note, it seems that a verdict for the plaintiff could not have cured this radical defect: but in the case of Roe *v.* Haugh, 1 Salk. 29. which was the converse of the last-mentioned case in its circumstances, and the relative situation of the parties, the verdict was held by four judges against three to have cured the omission to allege a sufficient consideration in the declaration. There, in consideration that the plaintiff would accept C. to be his debtor for 20*l.* due to him from A., in the place of A., C. promised and undertook to B. to pay to him the 20*l.*; and this was adjudged good, after a verdict, without express averment that A. was discharged; for the majority of the judges in the Exchequer Chamber held that being after verdict, they ought to do what they could to help it, and that, therefore, they would not take it as a promise only on the part of C. because as such it could not bind, unless A. was discharged; but they construed it as a mutual promise, viz. that C. promised B. to pay the debt, and B. promised *consideratione inde* to discharge A.

ginal representative liability. Since the case, however, of Wain *v.* Warlters[e], and more particularly Egerton *v.* Matthews[f], it seems that the writing, to be valid, within the fourth section of the statute, should, in the case of such promise made by an executor, not only state the consideration whether it be forbearance of suit, or whatever else, in terms, but that the undertaking on both sides should be comprised in the agreement, so as to make it a subject of action to either party; for it was intimated by the Chief Justice, in the first-mentioned case, that 'the obligatory part of the transaction was indeed the promise, which will account for the word promise being used in the first part of the clause, but still in order to charge the party making it, the statute proceeds to require that the *agreement*, by which must be understood *the agreement in respect of which the promise was made*, must be reduced into writing.'

[e] 5 East. 10. [f] 6 East. 307.

APPENDIX.

I.—*THE STATUTES.*

29 Car. 2. c. 3.

An Act for the Prevention of Frauds and Perjuries.

FOR prevention of many fraudulent practices, which are commonly endeavoured to be upheld by perjury, and subornation of perjury; be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and the Commons, in this present Parliament assembled, and by the authority of the same, That, from and after the four and twentieth day of June, which shall be in the year of our Lord one thousand six hundred seventy and seven, all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorised by writing, shall have the force and effect of leases or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases or estates, or any former law or usage to the contrary notwithstanding.

Parol leases and interests of freehold shall have the force of estates at will only.

Except leases not exceeding three years, &c.

II. Except, nevertheless, all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord, during such term, shall amount unto two third parts at the least of the full improved value of the thing demised.

No leases or estates of freehold or copyhold shall be granted or surrendered by word.

III. And moreover, that no leases, estates, or interests, either of freehold, or terms of years, or any uncertain interest, not being copyhold, or customary interest, of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall at any time after the said four and twentieth day of June, be assigned, granted, or surrendered, unless it be by deed or note, in writing, signed by the party so assigning, granting or surrendering the same, or their agents thereunto lawfully authorised by writing, or by act and operation of law.

Promises and agreements by parol.

IV. And be it further enacted by the authority aforesaid, That, from and after the said four and twentieth day of June, no action shall be brought, whereby to charge any executor or administrator, upon any special promise, to answer damages out of his own estate; (2) or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; (3) or to charge any person upon any agreement made upon consideration of marriage; (4) or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; (5) or upon any agreement that is not to be performed within the space of one year from the making thereof; (6) unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.

Devises of lands shall be in writing, and attested by three or four witnesses.

V. And be it further enacted, by the authority aforesaid, That, from and after the said four and twentieth day of June, all devises and bequests of any lands or tenements, devisable either by force of the statute of wills, or by this statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person, in his presence, and by his express directions, and shall be attested and subscribed in the presence of the

said devisor, by three or four credible witnesses, or else they shall be utterly void, and of none effect.

VI. And moreover, no devise in writing of lands, tenements, or hereditaments, or any clause thereof, shall at any time after the said four and twentieth day of June, be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence, and by his directions and consent; (2) but all devises and bequests of lands and tenements shall remain and continue in force until the same be burnt, cancelled, torn, or obliterated, by the testator, or by his directions, in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses, declaring the same; any former law or usage to the contrary notwithstanding.

How the same shall be revocable.

VII. And be it further enacted, by the authority aforesaid, That, from and after the said four and twentieth day of June, all declarations or creations of trusts or confidences, of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect.

All declarations or creations of trusts shall be in writing.

VIII. Provided always, That where any conveyance shall be made of any lands or tenements, by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then, and in every such case, such trust or confidence shall be of the like force and effect, as the same would have been, if this statute had not been made; any thing herein-before contained to the contrary notwithstanding.

Trusts arising, transferred or extinguished by implication of law, are excepted.

IX. And be it further enacted, That all grants and assignments of any trust or confidence, shall likewise be in writing, signed by the party granting or assigning the same by such last will or devise, or else shall likewise be utterly void, and of none effect.

Assignments of trust shall be in writing.

X. And be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of June,

Lands, &c. shall be liable to

the judgments, &c. of cestuy que trust.

it shall and may be lawful for every sheriff, or other officer, to whom any writ or precept is or shall be directed, at the suit of any person or persons, of, for, and upon any judgment, statute, or recognizance, hereafter to be made, or had, to do, make, and deliver execution unto the party in that behalf suing, of all such lands, tenements, rectories, tithes, rents, and hereditaments, as any other person or persons be in any manner of wise seized or possessed, or hereafter shall be seized or possessed in trust for him against whom execution is so sued, like as the sheriff or other officer might, or ought to have done, if the said party against whom execution hereafter shall be so sued, had been seised of such lands, tenements, rectories, tithes, rents, or other hereditaments, of such estate as they be seised of in trust for him at the time of the said execution sued, (2) which lands, tenements, rectories, tithes, rents, and other hereditaments, by force and virtue of such execution, shall accordingly be held and enjoyed, freed and discharged from all incumbrances of such person or persons, as shall be so seised or possessed in trust for the person against whom such execution shall be sued; (3) and if any *cestuy que* trust hereafter shall die, leaving a trust in fee-simple to descend to his heir, there, and in every such case, such trust shall be deemed and taken, and is hereby declared to be assets by descent, and the heir shall be liable to and chargeable with the obligation of his ancestors for and by reason of such assets, as fully and amply as he might or ought to have been, if the estate in law had descended to him in possession in like manner as the trust descended; any law, custom, or usage, to the contrary in any wise notwithstanding.

And held free from the incumbrances of the persons seised in trust.

Trusts shall be assets in the hands of heirs.

No heir shall by reason thereof become chargeable of his own estate.

XI. Provided always, that no heir shall become chargeable by reason of any estate or trust made assets in his hands by this law, shall by reason of any kind of plea, or confession of the action, or suffering judgment by *nient dedire*, or any other matter be chargeable, to pay the condemnation out of his own estate; (2) but execution shall be sued of the whole estate, so made assets in his hands by descent, in whose hands soever it shall come, after the writ purchased, in the same manner as it is to be at and by the common law,

where the heir at law pleading a true plea, judgment is prayed against him thereupon; any thing in this present act contained to the contrary notwithstanding.

XII. And for the amendment of the law in the particulars following, (2) be it further enacted by the authority aforesaid, That from henceforth any estate, *pur auter vie*, shall be devisable by a will in writing, signed by the party so devising the same, or by some other person in his presence, and by his express directions, attested and subscribed in the presence of the devisor, by three or more witnesses; (3) and if no such devise thereof be made, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of a special occupancy, as assets by descent, as in case of lands in fee-simple, (4) and in case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof, by virtue of the grant, and shall be assets in their hands.

Estates *pur auter vie*, shall be devisable.

And shall be assets in the heir's hand.

And where there is no special occupant, shall go to the executors.

XIII. And whereas it hath been found mischievous, that judgments in the King's Courts, at Westminster, do many times relate to the first day of the term whereof they are entered, or to the day of the return of the original, or filing the bail, and bind the defendant's lands from that time, although in truth they were acknowledged, or suffered and signed in the vacation time, after the said term, whereby many times purchasers find themselves aggrieved.

XIV. Be it enacted, by the authority aforesaid, That, from and after the said four and twentieth day of June, any judge or officer of any of his Majesty's Courts of Westminster, that shall sign any judgments, shall, at the signing of the same, without fee for doing the same, set down the day of the month and year of his so doing, upon the paper, book, docket, or record, which he shall sign; which day of the month and year shall be also entered upon the margent of the roll of the record, where the said judgment shall be entered.

The day of signing any judgment shall be entered on the margent of the roll.

This clause extends to counties palatine, by 8 Geo. I. c. 25. s. 6.

XV. And be it enacted, That such judgments as against purchasers *bona fide*, for valuable consideration of lands, tenements, or hereditaments, to be charged thereby, shall, in consideration of law, be judgments only from such time as they shall be so signed, and shall not relate to the first day

And such judgments as against purchasers shall relate to such time only.

of the term whereof they are entered, or the day of the return of the original, or filing the bail; any law, usage, or course of any court to the contrary notwithstanding.

Writs of execution shall bind the property of goods but from the time of their delivery to the officer.

XVI. And be it further enacted, by the authority aforesaid, That, from and after the said four and twentieth day of June, no writ of *fieri facias*, or other writ of execution, shall bind the property of the goods against whom such writ of execution is sued forth, but from the time that such writ shall be delivered to the sheriff, under-sheriff, or coroners, to be executed: and for the better manifestation of the said time, the sheriff, under-sheriff, and coroners, their deputies and agents, shall upon the receipt of any such writ, (without fee for doing the same,) endorse upon the back thereof, the day of the month or year, whereon he or they received the same.

Contracts for sales of goods for ten pounds or more.

XVII. And be it further enacted, by the authority aforesaid, That, from and after the said four and twentieth day of June, no contract for the sale of any goods, wares, and merchandises, for the price of ten pounds sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such a contract, or their agents thereunto lawfully authorised.

The day of the enrolment of recognizances shall be set down; and lands in the hands of purchasers, bound from that time only.

XVIII. And be it further enacted, by the authority aforesaid, That the day of the month, and year of the enrolment of the recognizances, shall be set down in the margent of the roll where the said recognizances are enrolled; (2) and that from and after the said four and twentieth day of June, no recognizance shall bind any lands, tenements, or hereditaments, in the hands of any purchaser, *bona fide*, and for valuable consideration, but from the time of such enrolment; any law, usage, or course of any court to the contrary in any wise, notwithstanding.

Nuncupative wills.

XIX. And for prevention of fraudulent practices, in setting up nuncupative wills, which have been the occasion of much perjury, (2) be it enacted by the authority aforesaid, That, from and after the aforesaid four and twentieth day of

June, no nuncupative will shall be good, where the estate thereby bequeathed, shall exceed the value of thirty pounds, that is not proved by the oaths of three witnesses, (at the least) that were present at the making thereof; (3) nor unless it be proved that the testator, at the time of pronouncing the same, did bid the persons present, or some of them, bear witness, that such was his will, or to that effect; (4) nor unless such nuncupative will were made in the time of the last sickness of the deceased, and in the house of his or their habitation or dwelling, or where he or she hath been resident for the space of ten days, or more, next before the making of such will, except where such person was surprised or taken sick, being from his own home, and died before he returned to the place of his or her dwelling.

Explained by 4 Ann. c. 16. s. 14.

XX. And be it further enacted, That after six months passed after the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the said testimony, or the substance thereof, were committed to writing within six days after the making of the said will.

XXI. And be it further enacted, That no letters testamentary, or probate of any nuncupative will, shall pass the seal of any court, till fourteen days at the least after the decease of the testator be fully expired; (2) nor shall any nuncupative will be at any time received to be proved, unless process have first issued to call in the widow, or next of kindred to the deceased, to the end they may contest the same, if they please.

Probates of nuncupative wills.

XXII. And be it further enacted, That no will in writing, concerning any goods or chattels, or personal estate, shall be repealed, nor shall any clause, devise, or bequest, therein, be altered or changed by any words, or will by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof read unto the testator, and allowed by him, and proved to be so done by three witnesses at the least.

Wills of personal estate not to be revoked by word of mouth only.

XXIII. Provided always, That notwithstanding this act, any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his moveables, wages,

Soldiers' and mariners' wills excepted.

and personal estate, as he or they might have done before the making of this act.

The jurisdiction of courts saved.

XXIV. And it is hereby declared, That nothing in this act shall extend to alter or change the jurisdiction or right of probate of wills concerning personal estates, but that the Prerogative Court of the Archbishop of Canterbury, and other ecclesiastical courts, and other courts having right to the probate of such wills, shall retain the same right and power as they had before, in every respect; subject nevertheless to the rules and directions of this act.

22 and 23 C. 2. c. 10. husbands not compellable to make distribution of the personal estates of their wives.

XXV. And for the explaining one act of this present Parliament, intituled, "An Act for the better settling of intestates' estates," (2) be it declared by the authority aforesaid, That neither the said act, nor any thing therein contained, shall be construed to extend to the estates of feme coverts that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same, as they might have done before the making of the said act. Made perpetual by 1 Jac. 2. c. 17. s. 5.

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9 Geo. 2. c. 36.

An act to restrain the disposition of lands, whereby the same become unalienable.

Preamble.

WHEREAS *gifts or alienation of lands, tenements or hereditaments, in* Mortmain, *are prohibited or restrained by* Magna Charta, *and divers other wholesome laws, as prejudicial to and against the common utility; nevertheless this public mischief has of late greatly increased by many large and improvident alienations or dispositions made by languishing or dying persons, or by other persons, to uses called* Charitable uses, *to take place after their deaths, to the disherison of their lawful heirs;* for remedy whereof be it enacted by the King's

most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That from and after the twenty-fourth day of June, which shall be in the year of our Lord one thousand seven hundred and thirty-six, no manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal, whatsoever, nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatsoever, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, shall be given, granted, aliened, limited, released, transferred, assigned, or appointed, or any ways conveyed or settled to or upon any person or persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or incumbered by any person or persons whatsoever, in trust, or for the benefit of any charitable uses whatsoever; unless such gift, conveyance, appointment, or settlement of any such lands, tenements, or hereditaments, sum or sums of money, or personal estate (other than stocks in the public funds) be and be made by deed indented, sealed and delivered in the presence of two or more credible witnesses twelve calendar months at least before the death of such donor or grantor (including the days of the execution and death) and be enrolled in his Majesty's high court of *Chancery*, within six calendar months next after the execution thereof; and unless such stocks be transferred in the public books usually kept for the transfer of stocks six calendar months at least before the death of such donor or grantor, (including the days of the transfer and death) and unless the same be made to take effect in possession for the charitable use intended, immediately from the making thereof, and be without any power of revocation, reservation, trust, condition, limitation, clause, or agreement whatsoever, for the benefit of the donor or grantor, or of any person or persons claiming under him.

After 24 June, 1736, no manors, lands, &c. nor money to be laid out in lands, to be given for charitable uses, unless by deed indented, and executed before 2 witnesses 12 months before the death of the donor, and enrolled, &c.

II. Provided always, That nothing herein before mentioned relating to the sealing and delivering of any deed or deeds twelve calendar months at least before the death of the

The said limitations not to extend to purchase

or transfers made for valuable considerations.

grantor, or to the transfer of any stock six calendar months before the death of the grantor or person making such transfer, shall extend, or be construed to extend, to any purchase of any estate or interest in lands, tenements, or hereditaments, or any transfer of any stock, to be made really and *bona fide* for a full and valuable consideration actually paid at or before the making such conveyance or transfer without fraud or collusion.

Gifts, &c. made after 24 June, 1736, otherwise than directed by this act, to be absolutely void. *Sir William Ashburnham et al.* v. *Bradshaw et al.* 4 Dec. 1739. *by the judges at Serjeant's Inn. Sorresbery,* v. *Hollings,* 6 Aug. 1740. *in Chan. The attorney general,* v. *Greaves,* 21 Nov. 1752.

III. And be it further enacted by the authority aforesaid, That all gifts, grants, conveyances, appointments, assurances, transfers, and settlements whatsoever, of any lands, tenements, or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any lands, tenements, or hereditaments, or of any stock, money, goods, chattels, or other personal estate, or securities for money to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect the same, to or in trust for any charitable uses whatsoever, which shall at any time, from and after the said twenty-fourth day of June, one thousand seven hundred and thirty-six, be made in any other manner or form than by this act is directed and appointed, shall be absolutely, and to all intents and purposes, null and void.

But not to prejudice the 2 universities, or the colleges of Eton, Winchester, or Westminster.

IV. Provided always, That this act shall not extend, or be construed to extend, to make void the dispositions of any lands, tenements, or hereditaments, or of any personal estate to be laid out in the purchase of any lands, tenements, or hereditaments, which shall be made in any other manner or form than by this act is directed, to or in trust for either of the two universities within that part of Great Britain called England, or any of the colleges or houses of learning within either of the said universities, or to or in trust for the colleges of Eton, Winchester, or Westminster, or any or either of them, for the better support and maintenance of the scholars only upon the foundations of the said colleges of Eton, Winchester, and Westminster.

No college to hold more ad-

V. Provided nevertheless, and be it enacted by the authority aforesaid, That no such college or house of learning,

which doth or shall hold or enjoy so many advowsons of ecclesiastical benefices as are or shall be equal in number to one moiety of the fellows or persons usually stiled or reputed as fellows, or, where there are or shall be no fellows or persons usually stiled or reputed as fellows, to one moiety of the students upon the foundation, whereof any such college or house of learning doth or may by the present constitution of such college or house of learning consist, shall from and after the twenty-fourth day of June, one thousand seven hundred and thirty-six, be capable of purchasing, acquiring, receiving, taking, holding or enjoying any other advowsons of ecclesiastical benefices by any means whatsoever; the advowsons of such ecclesiastical benefices as are annexed to, or given for the benefit or better support of, the headships of any of the said colleges or houses of learning, not being computed in the number of advowsons hereby limited. vowsons than shall be equal to 1 moiety of their fellows, &c.

VI. Provided always, That nothing in this act contained shall extend or be construed to extend to the disposition, grant, or settlement of any estate, real or personal, lying or being within that part of Great Britain called Scotland. This act not to extend to estates in Scotland.

14 Geo. 2. c. 20.

IX. *And whereas, by an act made in the twenty-ninth year of the reign of king* Charles *the second, intituled,* An act for prevention of frauds and perjuries, *amongst other things, it is enacted, That estates* pur auter vie, *whereof no devise should be made, should, in case there should be no special occupant thereof, go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and should be assets in their hands: and whereas doubts have arisen, where no devise has been made of such estates, to whom the surplus of such estates, after the debts of such deceased owners thereof are fully satisfied, shall belong;* be it enacted by the authority aforesaid, That such estates *pur auter vie*, in case there be no special occupant thereof, of which no devise shall have been made according to the said act for prevention of frauds and perjuries, or so much thereof as shall not have 29 Car. II. c. 3. Surplus of estates *pur auter vie*, how to pass, if not devised.

been so devised, shall go, be applied, and distributed, in the same manner as the personal estate of the testator or intestate.

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25 Geo. 2. c. 6.

An Act for avoiding and putting an End to certain Doubts and Questions relating to the Attestation of Wills and Codicils, concerning Real Estates in that Part of Great Britain *called* England, *and in his Majesty's Colonies and Plantations in* America.

WHEREAS by an act made in the twenty-ninth year of the reign of his late Majesty King Charles the Second, intituled, "An act for prevention of frauds and perjuries," it is amongst other things enacted, that, from and after the twenty-fourth day of June, in the year of our Lord one thousand six hundred and seventy-seven, all devises and bequests of any lands or tenements devisable, either by force of the statute of wills, or by that statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express direction; and shall be attested and subscribed in the presence of the said devisor, by three or four credible witnesses, or else they shall be utterly void and of none effect, which hath been found to be a wise and good provision: but whereas doubts have arisen who are to be deemed legal witnesses within the intent of the said act; therefore, for avoiding the same, be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the

same, That if any person shall attest the execution of any will or codicil which shall be made after the twenty-fourth day of June, in the year of our Lord one thousand seven hundred and fifty-two, to whom any beneficial devise, legacy, estate, interest, gift, or appointment of or affecting any real or personal estate, other than and except charges on lands, tenements, or hereditaments, for payment of any debt or debts, shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment, shall, so far only as concerns such person attesting the execution of such will or codicil, or any person claiming under him, be utterly null and void; and such person shall be admitted as a witness to the execution of such will or codicil, within the intent of the said act; notwithstanding such devise, legacy, estate, interest, gift, or appointment, mentioned in such will or codicil.

If a devisee or legatee under the will attests a will, the devise or legacy shall be void, and the attestation effectual.

II. And be it further enacted by the authority aforesaid, That in case, by any will or codicil already made, or hereafter to be made, any lands, tenements, or hereditaments, are or shall be charged with any debt or debts, and any creditor whose debt is so charged, hath attested, or shall attest the execution of such will or codicil, every such creditor, notwithstanding such charge, shall be admitted as a witness to the execution of such will or codicil, within the intent of the said act.

If lands are charged with the payment of debts, the attestation of a creditor is good, and he is a good witness to prove the execution.

III. And be it further enacted by the authority aforesaid, That if any person hath attested the execution of any will or codicil already made, or shall attest the execution of any will or codicil which shall be made on or before the said twenty-fourth day of June, in the year of our Lord one thousand seven hundred and fifty-two, to whom any legacy or bequest is or shall be thereby given, whether charged upon lands, tenements, or hereditaments, or not; and such person, before he shall give his testimony concerning the execution of any such will or codicil, shall have been paid, or have accepted or released, or shall have refused to accept such legacy or bequest, upon tender made thereof, such person shall be admitted as a witness to the execution of such will or codicil,

within the intent of the said act, notwithstanding such legacy or bequest.

IV. Provided always, and be it further enacted, That in case of such tender and refusal as aforesaid, such person shall in no wise be intituled to such legacy or bequest, but shall be for ever afterwards barred therefrom; and in case of such acceptance as aforesaid, such person shall retain to his own use the legacy or bequest which shall have been so paid, satisfied or accepted, notwithstanding such will or codicil shall afterwards be adjudged or determined to be void for want of due execution, or for any other cause or defect whatsoever.

V. And be it further enacted, That in case any such legatee as aforesaid, who hath attested the execution of any will or codicil already made, or shall attest the execution of any will or codicil which shall be made on or before the said twenty-fourth day of June, in the year of our Lord one thousand seven hundred and fifty-two, shall have died in the life-time of the testator, or before he shall have received or released the legacy or bequest so given to him as aforesaid, and before he shall have refused to receive such legacy or bequest, on tender made thereof, such legatee shall be deemed a legal witness to the execution of such will or codicil, within the intent of the said act, notwithstanding such legacy or bequest.

The credit of every witness, so attesting, is to be subject to the determination of the court and jury.

VI. Provided always, That the credit of every such witness so attesting the execution of any will or codicil, in any of the cases in this act before-mentioned, and all circumstances relating thereto, shall be subject to the consideration and determination of the court, and the jury, before whom any such witness shall be examined, or his testimony or attestation made use of; or of the Court of Equity, in which the testimony or attestation of any such witness shall be made use of; in like manner, to all intents and purposes, as the credit of witnesses in all other cases ought to be considered of and determined.

VII. And be it further enacted by the authority aforesaid, That no person to whom any beneficial estate, interest, gift or appointment, shall be given or made, which is hereby

enacted to be null and void as aforesaid, or who shall have refused to receive any such legacy or bequest, on tender made as aforesaid, and who shall have been examined as a witness concerning the execution of such will or codicil, shall, after he shall have been so examined, demand or take possession of or receive any profits or benefit of or from any such estate, interest, gift, or appointment, so given or made to him, in or by any such will or codicil; or demand, receive, or accept from any person or persons whatsoever, any such legacy or bequest, or any satisfaction or compensation for the same, in any manner or under any colour or pretence whatsoever.

VIII. Provided always, and be it enacted by the authority aforesaid, That this act, or any thing herein contained, shall not extend, or be construed to extend, to the case of any heir at law, or of any devisee in a prior will or codicil of the same testator, executed and attested according to the said recited act, or any person claiming under them respectively, who has been in quiet possession for the space of two years next preceding the sixth day of May, in the year of our Lord one thousand seven hundred and fifty-one, as to such lands, tenements, and hereditaments, whereof he has been in quiet possession as aforesaid; and also that this act, or any thing herein contained, shall not extend or be construed to extend, to any will or codicil, the validity or due execution whereof hath been contested in any suit in law or equity, commenced by the heir of such devisor, or the devisee in any such prior will or codicil, for recovering the lands, tenements, or hereditaments, mentioned to be devised in any will or codicil so contested, or any part thereof, or for obtaining any other judgment or decree relative thereto, on or before the said sixth day of May, in the year of our Lord one thousand seven hundred and fifty-one, and which has been already determined in favour of such heir at law, or devisee in such prior will or codicil, or any person claiming under them respectively, or which is still depending, and has been prosecuted with due diligence; but the validity of every such will or codicil, and the competency of the witnesses thereto, shall be adjudged and determined in the same man-

ner, to all intents and purposes, as if this act had never been made; any thing herein-before contained to the contrary thereof in any wise notwithstanding.

IX. Provided always nevertheless, and it is hereby declared, That no possession of any heir at law, or devisee, in such prior will or codicil as aforesaid, or of any person claiming under them respectively, which is consistent with, or may be warranted by or under any will or codicil, attested according to the true intent and meaning of this act, or where the estate descended or might have descended to such heir at law, till a future or executory devise, by virtue of any will or codicil attested according to this act, should or might take effect shall be deemed to be a possession within the intent and meaning of the clause herein last before contained.

X. And whereas in some of the British colonies or plantations in America, the said act of the twenty-ninth year of the reign of King Charles the Second, has been received for law, or acts of assembly have been made, whereby the attestation and subscription of witnesses to devises of lands, tenements, and hereditaments, have been required: therefore, to prevent and avoid doubts which may arise in the said colonies, or plantations, in relation to the attestation of such devises of lands, tenements, and hereditaments, be it enacted by the authority aforesaid, That this act, and every clause, matter, and thing therein contained, shall extend to such of the said colonies and plantations, where the said act of the twenty-ninth year of the reign of King Charles the Second, is by act of assembly made, or by usage received as law, or where, by act of assembly or usage, the attestation and subscription of a witness or witnesses are made necessary to devises of lands, tenements, or hereditaments; and shall have the same force and effect in the construction of or for the avoiding of doubts upon the said acts of assembly, and laws of the said colonies and plantations, as the same ought to have in the construction of or for the avoiding of doubts upon the said act of the twenty-ninth year of the reign of King Charles the Second in England.

XI. Provided always, That as to cases arising in any of

the said colonies or plantations in America, no such devise, legacy, or bequest as aforesaid, shall be made null and void, by virtue of this act, unless the will or codicil, whereby such devise, legacy, or bequest shall be given, shall be made after the first day of March, which shall be in the year of our Lord one thousand seven hundred and fifty-three.

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26 Geo. 3. c. 63.

An Act for the further preventing Frauds and Abuses attending the payment of Wages, Prize Money, and other allowances, due for the service of Petty Officers and Seamen on board any of his Majesty's ships.

Preamble.

WHEREAS *great frauds and abuses are daily practised in the receiving of seamen's wages, notwithstanding former acts of parliament made for preventing the same: for remedy whereof,* be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, That, from and after the first day of August, one thousand seven hundred and eighty-six, no letter of attorney, made by any petty officer, or seaman in the service of his Majesty, his heirs or successors, or letter of attorney, made by the executors or administrators of any such officer or seaman, in order to impower or entitle any person or persons to receive any wages, pay, or allowances of money of any kind, due, or to grow due for such service, shall be good and valid, or sufficient for that purpose, unless such letter of attorney shall be made and declared to be revocable by the express words thereof; and that no letter of attorney, or will, made by any petty officer or seaman in the service of his Majesty, his heirs or succes-

From Aug. 1, 1786, no letter of attorney, of a petty officer, &c. to be valid, unless made revocable.

Letters of attorney, &c to be

attested by the captain of the ship, &c. sors, whereby any wages, pay, prize money, or allowance of money of any kind, due, or to grow due for such service, is authorised to be received or bequeathed, shall be good and valid, and sufficient for the purpose, unless such letter of attorney, or will, if made by any such officer or seaman, then in the service of his Majesty, his heirs and successors, shall be signed before, and attested by, the captain, or by the officer then commanding, and one or other of the signing officers of the ship to which such petty officer or seaman shall belong, and shall specify in the body thereof, the name of the ship, and also the number at which the maker of such will, or letter of attorney, stands upon the ship's book; or by the agent of any of his Majesty's hospitals, or quarters appointed to receive sick and wounded seamen, commonly called *sick quarters*, in which such petty officer or seaman may be for the time; and unless such letter of attorney, or will, if made by any such officer or seaman who shall have been discharged from the service of his Majesty, his heirs or successors, or if such letter of attorney is made by the executors or administrators of any such officer or seaman, and

if made within the bills of mortality, to be attested by an officer appointed for that purpose; if in an outport, by the treasurer of the navy's clerk; and in any other place by the minister, &c.

made within the bills of mortality of the cities of London and Westminster, is attested by an officer to be appointed by the treasurer of his Majesty's navy, for the purpose of inspecting the wills, and letters of attorney, of such officers and seamen, or, if made at any of the ports where seamen's wages are paid, is attested by the treasurer of the navy's chief or second clerk there, or if made at any other place, is attested by the minister and churchwardens of any parish in England or Ireland, or in that part of Great Britain, called Scotland, by the minister and two elders of the parish, where such petty officer or seaman, executors or administrators, shall respectively reside.

Particulars to be specified in letters of attorney and will.

II. And be it enacted, by the authority aforesaid, That every such letter of attorney, and will, shall contain the name of the ship to which the person granting the same last belonged, and also the full description of the residence, profession, or business, of the person to whom, or in whose favour, the said letter of attorney, or will, is made, and also the day of the month, and place, where the said letter of attorney, or will, was executed.

III. And be it enacted, by the authority aforesaid, That after such letter of attorney, or will, shall be executed under the hand and seal of the party, and attested in manner above-mentioned, the same shall not be delivered to such party himself, or to any person or persons for his behalf, but the same, if executed abroad, shall be, with all convenient speed, sent by the commander of any of his Majesty's ships, or agent of his Majesty's hospitals or sick quarters, at the times when they transmit their respective returns to the navy, and sick and hurt boards; or, if executed in Great Britain or Ireland, shall be sent by the commander of any of his Majesty's ships, agents of his Majesty's hospitals, or sick quarters, treasurer of the navy's clerks, minister of the parish, or whoever of them shall attest such letter of attorney, or will, by the general post, addressed to the treasurer or paymaster of the navy, at the navy pay office, London.

Letters of attorney, &c. to be transmitted to the navy, or sick and hurt boards, &c.

IV. And be it enacted, by the authority aforesaid, That the said treasurer, or paymaster of the navy, shall immediately deliver over the same to the officer before-mentioned, appointed for inspecting the wills, and letters of attorney, of seamen; which inspector shall, immediately on receipt of such letter of attorney, or will, duly register the same, in a numerical and alphabetical manner, in a separate book or books, to be kept by him for the purpose of registering such letters of attorney, and wills, specifying the date of such letter of attorney, or will, and the place where executed, the name and addition of the person in whose favour such letter of attorney is granted, and the name and addition of the executor or executors named in such wills, and the names and qualities of the witnesses, attesting the same; and the said inspector is directed, and hereby required, if the same shall appear to be witnessed by the commander of any ship, or agent of his Majesty's hospital, or sick quarters, or treasurer of the navy's clerks, to examine and compare his signature to the attestation of such letter of attorney, or will, with that set and subjoined to the pay or muster-books of such ship, or with the returns made by the agent of such hospital, or sick quarters, or any public accounts signed by such clerk of the treasurer of the navy, to all which documents it is hereby directed he shall have free access at all times, or with

Letters of attorney, &c. to be delivered to the officers appointed to inspect them, who to register them.

and to examine the signatures of the witnesses;

and where they appear not to be genuine, to stop them and acquaint the parties thereof.

any other instruments which he may have in his possession or power; and in case it shall appear to him that such letter of attorney, or will, is not genuine and authentic, he shall not pass the same, but shall give notice by letter, to be sent by the general post, to the person in whose favour such letter of attorney is granted, or person or persons named executor or executors in such will, informing him or them that the said letter of attorney, or will, is stopt, and the reason thereof; but if, upon such examination and enquiry, it shall appear to the said inspector, that the said letter of attorney, or will, is genuine and authentic, he, or a person authorised to officiate for him, shall sign his name to such letter of attorney, or will, and also put a stamp thereon, to be made and kept for the purpose, in token of his approbation thereof; and every such letter of attorney shall be kept as one of the vouchers of the treasurer of the navy's accounts: and the said inspector shall, immediately after such enquiry and approbation, give notice by letter, to be sent by the general post, to the person in whose favour such letter of attorney is granted, that he has received and approved of the same, and he shall at the same time send to such attorney a check, specifying the number of such letter of attorney, the name and addition of the person granting the same, the name and addition of the person in whose favour the same is granted, the date and place when and where executed, and the names of the witnesses attesting the same, which said check shall be signed and stamped by the said inspector, or person authorised to officiate for him, and shall, to such attorney, stand in the place of his original letter of attorney, and shall be to him a sufficient authority to demand payment of and discharge all such wages, pay, prize money, or allowance of money, to which the person granting the same was entitled, for his service on board any of his Majesty's ships; and the said inspector shall in like manner give notice, to be sent by the general post, to the person or persons named and appointed executor or executors in such will, that such will is received and approved of; and the said inspector shall number and register the said will so signed and stamped by him as aforesaid, and shall make out a check, in the manner as above directed, with respect to letters of attorney, which

If genuine, approbation to be stampt thereon, and kept as vouchers of the navy accounts.

Notice to be sent to the attornies when powers are approved, and also checks, to authorise them to receive the money.

Notice of approbation of wills likewise to be sent, which will

check he shall forward in like manner to the said executor or executors, and which shall be a sufficient authority for them, or for their attornies, to apply, upon the testator's death, to the said inspector, requesting that the will may be directed and sent by him to a proctor in Doctors Commons, where they may, on application, obtain probate thereof; which probate, when obtained, shall be lodged with the said inspector of seamen's wills, who, or the person authorised to officiate for him, is hereby directed to certify, upon the check formerly delivered, that a probate has been granted, and the check shall then, to such executor or executors, stand in the place of such probate, and shall be to him sufficient authority to demand payment of and discharge all sums that shall be due to him as executor to the party who made the said will.

authorise the executor to obtain probates.

Probates to be lodged with the inspector, and the same certified upon the check.

V. And be it enacted, by the authority aforesaid, That the above-mentioned inspector shall, in return to all letters of attorney, and wills, received by him from ministers of parishes, give notice as aforesaid, to the said minister, who transmitted the same, and not to the grantor thereof, of his having passed and approved of such letter of attorney, or will, and send the check by the general post, made out in the manner above-mentioned, to the said minister; and which notice from the said inspector shall be addressed to the minister of the parish, (naming the same,) without inserting the name of such minister, to be delivered to him at his manse or dwelling-house; and every such minister of a parish shall deliver the said check to the party who executed such letter of attorney, or will: and all letters and packets addressed to, or sent by, the said treasurer or paymaster of the navy, or inspector to be appointed as aforesaid, shall, from and after the passing of this act, be sent and received free from the duty of postage, in the same manner, and under the same restrictions, as the clerk assistant, and chief clerk without doors, of the house of Commons of Great Britain, now send and receive the same.

Inspector to send checks to the minister who transmits powers of attorney, &c. to be delivered to the grantors.

Letters touching the premises to pass free of postage.

VI. And be it enacted, by the authority aforesaid, That all captains and commanders of ships, shall, upon their monthly muster books, or returns, specify which of the men, mentioned in the said returns, have granted any letter of at-

Grants of letters of attorney to be inserted in the monthly returns.

torney during that month, or space of time, from the preceding returns, by inserting the date thereof opposite to the party's name.

The steps to be taken to recover wages, &c. due to men dying intestate.

VII. And be it enacted, by the authority aforesaid, That when any petty officer or seaman belonging, or who shall have belonged, to any of his Majesty's ships, shall die intestate, leaving any wages, pay, prize-money, or allowance of money of any kind, due to them in respect of such service, the same shall not be paid unto any representative of such intestate, but upon letters of administration, to be obtained in the following manner; *videlicet*, The person claiming such administration, shall give in a note or petition, to the inspector of seamen's wills, stating the name of the deceased, and to what part of his Majesty's dominions he originally belonged, and the name or names of the ship or ships on board of which he served, together with his own name and addition, at full length, and his relation to, or connection with, the deceased, and also what other relations, to the best of his knowledge, the deceased has alive at the time, and where they are resident; and which petition shall be certified by two reputable housekeepers of the parish, town, or place where such petitioner is resident, certifying that they believe the contents of the said petition to be true; and which petition and certificate shall be further certified by the minister of the parish, and two of the churchwardens, or two of the elders, certifying that the two persons who certified the petition, in manner above-mentioned, are resident within the parish, and persons of good repute: whereupon the inspector of seamen's wills, as aforesaid, shall make such enquiry as to him shall appear necessary, for ascertaining the truth of the said petition; and if, upon such enquiry, he shall be satisfied of the truth thereof, and it also appearing that no will of such deceased has been lodged with him, he shall deliver or send, to the person claiming to be such administrator, an abstract of the said petition, with a note or ticket subjoined thereto, signed by the said inspector or person authorised to officiate for him, and marked with his stamp, certifying that the contents of the said petition appear to him to be true, and that the person claiming to be admi-

nistrator, may obtain letters of administration to the deceased, provided he is otherways entitled thereto by law; which certificate shall be directed by the inspector to a proctor in Doctors' Commons, for the purpose that letters of administration may pass in favour of the petitioner, if entitled thereto by law, but not otherways; and such original petition and certificate shall be lodged, and remain in the records of the treasurer of the navy, and be preserved by him; and the letters of administration, when obtained, shall be lodged and registered, in the same manner with the probates of wills, in the hands of the inspector, who is hereby directed to grant a check, signed and stamped by him, or by the person authorised to officiate for him, to the administrators, or their attornies, which shall stand in the place of the administration, and be to them a sufficient authority to demand payment of, and discharge, all sums that shall be due to them as administrators to the party deceased.

Penalty on proctors, &c. assisting in procuring probates of wills, &c. contrary to this act.

VIII. And it is hereby further enacted, That if any proctor, register, or other officer of any ecclesiastical court, shall be aiding and assisting in procuring probate of the will, or letters of administration, for the purpose of enabling any person to receive the wages, pay, prize-money, or allowance of money of any kind, due, or becoming due, for their service on board any ship or ships then in, or formerly belonging to his Majesty, his heirs and successors, without first obtaining the certificate from the inspector of seamen's wills, and letters of attorney, or person authorised to officiate for him, in manner above-directed, every such proctor, register, or other officer, shall forfeit and pay the sum of five hundred pounds, and for ever after be incapable of acting as proctor, register, or in any other capacity, in any ecclesiastical court in Great Britain or Ireland.

Abstracts of this act to be hung up in every ship, and no captain to have his general certificate till the navy board are satisfied it has been done.

IX. And be it enacted, by the authority aforesaid, That the lord high admiral of Great Britain, or the commissioners for executing the office of lord high admiral of Great Britain, shall direct abstracts of this act to be printed, and that a competent number of copies of the said abstracts be delivered to the captain or commander of every ship and vessel of his Majesty, his heirs and successors; and such captain or commander, as soon as the ship or vessel by him com-

manded shall be put into sea pay, shall cause one of the said printed abstracts to be hung up and affixed to the most public place of such ship or vessel, and shall cause the same to be constantly kept and renewed, so that they may at all times be accessible to the petty officers and seamen on board of such ship or vessel; and the commissioners of the navy are hereby charged and directed strictly to enquire whether the directions hereby given for hanging up and affixing the said abstracts, as aforesaid, have been duly observed by the captain or commander of such ship or vessel, and not to grant such captain or commander his general certificate until they are fully satisfied thereof.

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32 Geo. 3. c. 34.

An Act for explaining and amending an Act passed in the twenty-sixth year of the reign of his present Majesty, intituled, An Act for the further preventing frauds and abuses attending the payment of wages, prize money, and other allowances, due for the service of petty officers and seamen on board any of his Majesty's ships: *and for further extending the benefits thereof to petty officers and seamen, non-commissioned officers of marines, and marines, serving, or who may have served, on board any of his Majesty's ships.*

Preamble. 26 Geo. 3. c. 63. recited.

WHEREAS *an Act, passed in the twenty-sixth year of the reign of hispresent Majesty, (intituled,* An Act for the further preventing frauds and abuses attending the payment of wages, prize money, and other allowances due for the service of petty officers and seamen on board any of his Majesty's ships:) *and whereas it is just that the provisions of the said Act should be extended to marines serving on board ships*

in his Majesty's service, and would conduce much to the advantage of the representatives of seamen and marines if the same were further extended, and certain parts thereof explained and amended: be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, That no letter of attorney, or will, made or executed by any non-commissioned officer of marines, or marine, or letter of attorney made or executed by the executor or executors, or administrator or administrators, of any such non-commissioned officer of marines, or marine, after the first day of August, one thousand seven hundred and ninety-two, shall be good and valid, and sufficient for receiving the whole or any part of the wages, prize money, or other allowances of money due, or which may hereafter become due, to such non-commissioned officers of marines, or marine, for their services in the navy, or to such administrators or executors, as the representatives of such non-commissioned officers of marines, or marine, unless such letter of attorney, and will, shall be made, executed, and attested in the manner and form, and agreeable to the directions in the different events specified and mentioned in the afore-mentioned act, passed in the twenty-sixth year of the reign of his present Majesty; and all letters of attorney, and will, so made or executed by any non-commissioned officer of marines, or marine, for the purpose of receiving and bequeathing all or any part of their wages, prize money, or other allowances due to them, or letters of attorney made by such executor and administrator, for the purpose of receiving money due to him or them, as representative of such non-commissioned officer of marines, or marine, shall be transmitted, inspected, checked, and proved in the same manner, and under the same penalties and forfeitures, as by the act above-mentioned is directed and enacted in regard and with respect to letters of attorney, and wills, made and executed by petty officers or seamen in his Majesty's service, or by the executors and administrators of such petty officers and seamen, in so far as the afore-mentioned act, passed in the twenty-sixth year of the reign of his

From August 1, 1792, no letter of attorney or will of a non-commissioned officer of marines, or marine, to be valid, unless made according to the recited act, &c.

present Majesty, is not repealed, altered, or amended, by this present act.

Letters of attorney or orders from discharged petty officers, &c. executed within seven miles of a port where seamen's wages are then paid, not valid, unless attested by a clerk of the treasurer of the navy, &c.

II. Provided always, and be it further enacted by the authority aforesaid, That no letter of attorney, or order, made or executed by any petty officer, seaman, non-commissioned officer of marines, or marine, who shall have been discharged from the service of his Majesty, his heirs or successors, and who shall be at or within the distance of seven miles from any of the ports where seamen's wages are paid for such service, at the time of making such letter of attorney, shall be good and valid, and sufficient for receiving the whole or any part of the wages, prize money, or other allowances of money due, or to grow due, to such petty officer, seaman, non-commissioned officer of marines, or marine, for such service, unless such letter of attorney, or such order, shall be signed before and attested by a clerk of the treasurer of the navy at such port, or by the inspector of seamen's wills, and powers of attorney; any thing in the aforesaid act to the contrary thereof in anywise notwithstanding.

Captains to deliver to discharged petty officers, &c. a certificate in the following form.

III. And be it enacted by the authority aforesaid, That, from and after the said first day of August one thousand seven hundred and ninety-two, when and so often as any petty officer, seaman, non-commissioned officer of marines, or marine, shall be in anyways discharged from any ship or vessel in the service of his Majesty, his heirs or successors, the captain or commanding officer of such ship or vessel shall make, or cause to be made out, a certificate in the manner and form following, or to the like effect:

Form of certificate.

No.

THESE are to certify, That A. B. *has served as on board of his Majesty's ship under my command, from the day of to the day of dated the of*

A. B. *is feet inches high, is of a complexion, and aged years.*

And which he shall sign with his name, and deliver, or cause

to be delivered, to such petty officer, seaman, non-commissioned officer of marines, or marine, at the time of his being discharged; and no petty officer, seaman, non-commissioned officer of marines, or marine, shall be entitled to receive his wages, pay, or other allowances for services on board any ship or vessel in the service of his Majesty, his heirs or successors, unless at the time of paying such wages, pay, or allowances, he shall be identified by one or more of the commissioned or warrant officers who belonged to the ship or vessel at the time, or during some part of the time, for which he may so claim the payment for such services, or unless he produces a certificate as above described, and directed to be delivered to him as aforesaid; no petty officer, seaman, non-commissioned officer of marines, or marine, who shall be discharged from any ship or vessel in the service of his Majesty, into any other ship or vessel in such service, shall be entitled to receive his wages, pay, or allowances of any kind, for his service on board of the ship to which he shall have last belonged, unless he shall enter and be mustered three times in the ship or vessel into which he shall be so discharged, or appear upon the books of such ship or vessel into which he next goes to be regularly discharged therefrom; or if such petty officer or seaman, non-commissioned officer of marines, or marine, be taken by the enemy, unless he voluntarily return and enter on board some ship or vessel in the service of his Majesty, his heirs or successors, in a reasonable time after he shall be released from prison; or if the ship or vessel in which such petty officer or seaman, non-commissioned officer of marines, or marine, last served be lost or destroyed, and the crew, or any part of the crew, be saved, unless he enters again in a reasonable time on board some ship or vessel in such service; or if such petty officer or seaman, non-commissioned officer of marines, or marine, be discharged from the ship or vessel to which he belonged, to any of his Majesty's hospitals, unless he enters the ship or vessel to which he shall be discharged from such hospital, or be discharged out of the service; or unless, in any of the above specified events, reasonable cause shall be shewn, and allowed by the commissioner of the navy comptrolling such

No petty officer, &c. to be entitled to receive his wages, unless his person be identified by an officer of the ship, or unless he produces such a certificate; or if discharged from one ship into another; or taken by the enemy; or shipwrecked, unless he complies with the regulations herein mentioned.

payment, and the clerk of the treasurer of the navy making the same, for not producing such certificate, or for non-compliance with any thing herein directed.

No petty officer, &c. who has run from a ship shall receive wages unless his mark be taken off.

IV. And be it also enacted by the authority aforesaid, That no petty officer or seaman, non-commissioned officer of marines, or marine, who shall be marked on the books of any ship or vessel in the service of his Majesty, his heirs or successors, as having run therefrom, shall receive his wages, pay, prize money, or other allowances of money for such ship or vessel, unless such mark shall be taken off by order of the commissioners for executing the office of lord high admiral of Great Britain, or by order of the commissioners of his Majesty's navy.

When ships having been twelve or more months in pay, shall arrive where any commissioner of the navy resides, and money shall be issued for paying them, the wages for the time the books are preparing shall be reserved over the six months to be left unpaid pursuant to 31 Geo. 2. c. 10.

V. And be it further enacted by the authority aforesaid, That when and so often as any ship or vessel, having been twelve or more calendar months in sea pay, shall be or arrive in any port of Great Britain where any commissioner of the navy shall be or reside, and money shall have been issued for payment of the wages due upon the books of such ship or vessel, sufficient time shall be allowed for sending to the navy office, preparing, and examining the books of the said ship or vessel; and the wages due to the officers or seamen, non-commissioned officers of marines, or marine, of or belonging to such ship or vessel, for the time during which the said books shall have been examining and preparing (which shall be done without delay) shall be reserved and kept in arrear, over and above the six months ordered to be left unpaid by an act made in the thirty-first year of the reign of his late Majesty King George the Second, intituled, *An Act for the encouragement of seamen employed in the royal navy, and for establishing a regular method for the punctual, frequent, and certain payment of their wages; and for enabling them more easily and readily to remit the same for the support of their wives and families, and for preventing frauds and abuses attending such payments*, any thing therein contained to the contrary notwithstanding.

No letter of attorney to be passed by the inspector, until a cer-

VI. And be it further enacted by the authority aforesaid, That, from and after the said first day of August one thousand seven hundred and ninety-two, no letter of attorney granted by any petty officer, seaman, non-commissioned of-

ficer of marines, or marine, shall be passed, stamped, and allowed of by the inspector of seamen's wills and powers of attorney, until a certificate is produced to him from the captain or captains, or commanding officer or commanding officers of the ship or ships, vessel or vessels, to which the grantor of such letter of attorney at the time belonged, and for which the wages, pay, or allowances to be received by such letter of attorney became due, and which shall be in the manner and form following, or to the like effect: tificate is produced in the following

No.

THESE are to certify, That A. B. has served as on board of his Majesty's ship under my command, from the to the dated the of A. B. is feet inches high, is of a complexion, and aged years. Form,

unless such power of attorney shall have been made on board the ship or vessel for which he claimed payment for his services as aforesaid, and is executed in the manner or form directed by the before-mentioned act of the twenty-sixth year of the reign of his present Majesty, or unless reasonable cause shall be shewn to and allowed by such inspector of seamen's wills and powers of attorney, or person authorised to act for him, for dispensing with all or any of such certificate or certificates. unless executed on board agreeably to recited act, or reasonable cause be shewn for dispensing therewith.

VII. Provided also, and be it further enacted by the authority aforesaid, That when any sum, not exceeding the sum of seven pounds, shall be due and payable, by the rules of the navy, to any petty officer or seaman, non-commissioned officer of marines, or marine, in respect of his services in the navy, it shall and may be lawful for such petty officer or seaman, non-commissioned officer of marines, or marine, to give an order in writing for the payment of the same, upon the treasurer of the navy, which order shall be revocable as in the case of powers of attorney, and shall be payable to the person in such order named, or to his order; and the same shall be attested by the captain or commander, or any other An order for any sum not exceeding 7*l*. may be given upon the treasurer of the navy to be attested, &c. as herein mentioned

of the signing officers, or a lieutenant of the ship, on board of which such services were performed, accompanied with a certificate from one of the signing officers or lieutenants of such ship, certifying the particulars of the services of the drawer of such order, and the said order and certificate shall be laid before the said inspector, who shall examine the same, and if he sees no cause to suspect the truth and authenticity thereof, he shall stamp and pass the same for payment; but if he shall see good cause to suspect the truth and authenticity of such order, he shall report the same to the treasurer, or to the paymaster of the navy, and shall enter his caveat against the same, which shall prevent any money from being had and received thereon, until the same shall be authenticated to the satisfaction of the said treasurer or paymaster.

Who are to be deemed petty officers, &c. within the meaning of this and former acts.

VIII. *And for the better explaining and distinguishing those officers in his Majesty's service who are herein described, and in former acts have been described, inferior or petty officers, and non-commissioned officers of marines; and likewise for the better explaining and distinguishing of that part of the complement on board his Majesty's ships who are herein described, and in former acts have been described, to be seamen and marines*, be it enacted by the authority aforesaid, That all and every part of the said complement of such ship and ships shall be, and are hereby declared to be, petty or inferior officers, seamen, non-commissioned officers of marines, or marine, excepting such as are rated upon the books of such ships, admirals or flag officers, and their secretaries, captains, and lieutenants, masters, second masters, and pilots, physicians, surgeons, chaplains, boatswains, gunners, carpenters, and pursers, captains of marines, captain lieutenants of marines, lieutenants, and quarter masters of marines.

Months to be reckoned by the calendar, except in the computation of pay, &c.

IX. And be it further enacted by the authority aforesaid, That all months mentioned in this and preceding acts of parliament, relating to the navy, shall be counted and reckoned calendar months, excepting only in the computation of pay, wages, and other allowances, which shall be computed and cast by reckoning twenty-eight days to the month, according to the usual practice of the navy.

X. *And, for the purpose of more effectually preventing frauds and forgeries in the execution and attesting of letters of attorney, wills, orders, or certificates, made by or in favour of petty officers, seamen, non-commissioned officers of marines, or marine*, be it enacted by the authority aforesaid, That every lieutenant on board any of his Majesty's ships shall, upon a page of every muster book of such ship, sign his name, for the purpose, and for the purpose only, that the inspector of seamen's wills, or such persons as shall be deputed by him, may have the opportunity of comparing the same with the name of any such lieutenant, attesting the will, letter of attorney, certificate, or order, executed by or in favour of any petty officer, seaman, non-commissioned officer of marines, or marine.

Lieutenants to sign their names in muster books for the purpose of being compared with the attestation of wills, &c.

XI. And be it enacted by the authority aforesaid, That all captains and commanders of ships shall, upon their monthly muster books or returns, specify which of the men mentioned in the said returns have granted or issued any will or testament during that month or space of time from the preceding returns, by inserting the date thereof opposite to the party's name.

Captains in the musters to specify which of the men have granted wills in the month.

XII. And be it further enacted, That when and so often as any captain or commander of any ship or vessel shall sail from any foreign station at a time when no opportunity shall offer of transmitting to the navy board the muster books, tickets and lists, by this or other acts of parliament directed to be made out and transmitted, then and in every such case such captain or commander shall leave such muster books, tickets, and lists with the naval officer, if any such officer shall be and reside at such place, or if there shall be no naval officer at such place, then and in that case with some respectable merchant, or other person, with proper directions to forward the same to the principal officers and commissioners of his Majesty's navy, by the first safe opportunity thereafter.

Captains sailing from foreign stations when no opportunity of transmitting musters, &c. offers, to leave them with the naval officer, &c.

XIII. And be it further enacted by the authority aforesaid, That if any captain or commander shall be in anyways removed from any ship or vessel in his Majesty's service, he shall deliver, or cause to be delivered over to his successor, one complete muster book, signed by himself and the proper

Captains when removed, to deliver complete muster books to their suc-

cessors, who are to give receipts for the same, without which no general certificate to be granted, &c.

officers, made up to the time of such removal, and for which he shall receive a receipt from the said successor; and the principal officers and commissioners of his Majesty's navy, are hereby strictly directed and required not to grant to any such captain or commander the general certificate to entitle him to his wages, or pay for such ship or vessel, unless such receipt shall be produced to them, or unless thereto required by particular order from the lord high admiral of Great Britain, or from the commissioners for executing the office of lord high admiral of Great Britain, or any three or more of such commissioners, in cases of necessity, and on its being made appear to their satisfaction, that the directions hereinbefore given in this behalf have been complied with, as far as the nature of the service would admit.

Parish ministers may deliver checks, transmitted by the inspector of seamen's wills, to attorneys, &c.

XIV. Provided always, and be it further enacted by the authority aforesaid, That it shall and may be lawful for the minister of any parish to whom the inspector of seamen's wills shall transmit his check of any letter of attorney, or will, passed and allowed by him, to deliver the said check to the attorney or executor in the said letter of attorney, or will, named and appointed, any thing contained in the said act passed in the twenty-sixth year of the reign of his present Majesty to the contrary thereof in anywise notwithstanding.

Letters of attorney and wills to be examined by the inspector, who shall issue checks, or in case of suspicion shall report to the treasurer of the navy, &c.

XV. And be it further enacted by the authority aforesaid, That all letters of attorney, and wills, made prior to the first day of August one thousand seven hundred and eighty-six, by petty officers and seamen belonging to any of his Majesty's ships, or by the executors or administrators of such petty officers and seamen, and every letter of attorney, and will, made by any non-commissioned officer of marines, or marine, or by the executors or administrators of such non-commissioned officers of marines, or marine, prior to the said first day of August one thousand seven hundred and ninety-two, for the purpose of receiving money of any kind in respect of his services in the navy, shall be inspected and examined by the inspector of seamen's wills, for the purpose of preventing frauds, forgeries, or impositions of any kind therein; and if such inspector shall see no cause to suspect the authenticity of the same, he shall affix the stamp of his office

and issue checks for the same; but if he shall see good cause to suspect the truth and authenticity of such letter of attorney, or will, he shall report the same to the treasurer or to the paymaster of the navy, and shall enter his caveat against such letter of attorney, or will, which shall prevent any money from being had and received thereon, until the same shall be authenticated to the satisfaction of the said treasurer or paymaster.

Wages of persons dying intestate to be paid only upon administration, obtained in the manner herein mentioned

XVI. And be it enacted by the authority aforesaid, That where any petty officer or seaman, non-commissioned officer of marines, or marine, belonging, or who shall have belonged to any of his Majesty's ships, has died or hereafter shall die intestate, leaving any wages, pay, prize money, or allowances of money of any kind due to him, in respect of services in his Majesty's navy, the same shall not be paid, from and after the said first day of August one thousand seven hundred and ninety-two, unto any representative of such intestate, but upon letters of administration, to be obtained in the following manner; viz. The person claiming such administration shall send or give in a note or letter to the inspector of seamen's wills, stating the name of the deceased, the name of the ship or ships to which he belonged, and that he has heard or been informed of his death, and requesting the inspector to give such directions as may enable him to procure letters of administration to the deceased, or to the like effect, upon receipt whereof the inspector of seamen's wills shall deliver or send to the person claiming such administration, a paper in the words and form following, or to the like effect:

Form of paper to be delivered by the inspector, to representatives of persons dying intestate,

LIST.

1st Degree—	Widow.
2d ———	Child.
3d ———	Father.
4th ———	Mother.
5th ———	Brother or Sister.
6th ———	Grand-father, or Grand-mother.
7th ———	Uncle, Aunt; Nephew, or Niece.
8th ———	Cousin-german.
9th ———	Cousin-german, once removed.
10th ———	Second-cousin.

SIR,

HAVING obtained information, That A. B. *born about the year* 17 *at and belonging to his Majesty's ship about the year died at in the month of* 17 *without leaving any will, to the best of my knowledge and belief; I now apply for a certificate to enable me to obtain letters of administration to his effects, being his and* { sole, or / one of his } *nearest of kin, no one, to the best of my knowledge and belief, of a nearer degree being living, at the time of the death of the said deceased, who died a* { bachelor / or widower }

My place of abode is

C. D.

WE hereby certify, That we personally know the above subscribing C. D. *and believe what* { he / she } *has stated to be rue.*

E. F.
G. H.

Both inhabitants of the parish of in the county of

No.

WE hereby certify, That the above E. F. G. H. *are known to us, are house-keepers, and persons of good repute.*

Witness our hands,

Dated at this day of } I. K. *Minister.* L. M. { *Churchwardens* N. O. { *or Elders.*

N. B. If the person applying, is the widow of the party deceased, she must forward, herewith, an extract from the parish register, or some other authentic proof of her marriage.

If the deceased died after he had left the naval service, an extract from the parish register, of his burial, or some other authentic proof of his death, must likewise be sent to this office.

If the person applying, knows any proctor in Doctors Commons, { she or he } is desired to mention his name, that he may be employed in obtaining the letters of administration.

This application, when filled up and attested, is to be sent by the general post, under cover, directed to the treasurer, or to the paymaster of his Majesty's navy, London.

And upon the receipt of the said paper, the person claiming such administration, shall fill up, or cause to be filled up, the several blanks in the first part of the said paper, according as the truth may be, and shall duly subscribe the same; and two inhabitants of the parish within which the person claiming such administration shall reside, shall sign the first certificate on the said paper, having previously filled up the blanks therein, agreeably to the truth; after which, the minister and two churchwardens, if in England, and two elders, if in Scotland, shall sign the second certificate, upon the aforesaid paper, the blanks therein being first filled up agreeably to the truth; and the said paper being in all things completed, according to the directions thereon, and hereby given, the same shall be returned, addressed to the treasurer, or to the paymaster of his Majesty's navy, London, who, upon receiving the same, shall direct the inspector of seamen's wills, to examine the same, and make such enquiry relative thereto, as may appear to him necessary on that behalf, and being satisfied, he shall forthwith make out a certificate in the following form, or to the like effect:

which must be filled up and certified; and if the inspector be satisfied, he shall make out a certificate in the following form.

Act of Parliament, 32 George III. ch. 34.

No.

CERTIFICATE to obtain LETTERS of ADMINISTRATION.

Navy Pay-office.

Form of certificate. *HAVING duly examined an application, made to this office, by* C. D. *of* *and county of* *stating that* {she / or he} *is the* {sole, or one / of the} *next of kin of* A. B. *originally of* *and late a* {seaman / marine} *belonging to his Majesty's ship* *and who died intestate, a* {bachelor, or / widower} *upon the* *day of* *and without leaving any one of a superior degree of kindred to him; and it appearing that no will of the deceased has been lodged in this office, I therefore grant this abstract of said application, and certify, that I believe what is therein stated, to be true, and also that the said* C. D. *may obtain letters of administration to the effects of the said deceased, which appear not to exceed the sum of* *pounds; provided always that* {he or / she} *is otherwise entitled thereto by law.*

I. P. *Inspector.*

To

Proctor in Doctors' Commons.

N. B. The previous commission or requisition is to be addressed agreeably to the superscription of the within cover, in which the same is to be enclosed, and forwarded by the proctor; and when the commission or requisition shall be returned to this office, it will be forwarded to him, and he is then to sue out letters of administration, and send them to the inspector, with his charge noted thereon.

Certificate to be addressed to And after filling up the blanks therein, as the case may be, shall sign and address the same to a proctor, or proctors, in

Doctors' Commons, the said inspector of seamen's wills, shall, at the same time, inclose and send with such certificate, a letter, addressed to the minister and churchwardens, or elders, as the case may be, of the parish within which the person applying for such letters of administration then resides; and the treasurer, or the paymaster of his Majesty's navy, or the said inspector, or either of them, shall frank the said letter, so as to carry the same, and the previous commission, or requisition, to be inclosed therein, free of the charge for postage, and which letter so to be addressed to the minister, and to the churchwardens, or elders, as the case may be, shall be in the words, figures, and form following, or to the like effect: a proctor, with a letter from the inspector in the following form.

No.

Navy Pay-office, *day of*

Rev. SIR,

HAVING received an application, attested by you, and two {churchwardens or elders} *of your parish, from* C. D. *also of your parish, stating that* {she or he} *is the* *and* {sole, or one of the} *next of kin of* A. B. *late a* {seaman or marine} *belonging to his Majesty's navy, and requesting leave to administer to his effects;* Form of the letter.

I am directed by act of parliament, of the thirty-second of George the third, ch. 34. to forward you the enclosed {commission or requisition,} *for the purpose of swearing* {him or her} *accordingly: provided, to the best of your knowledge and belief,* {she or he} *answers the description contained in the same.*

I am, Rev. SIR,

Your most obedient Servant,

I. P. *Inspector.*

P. S. *When the* {commission or requisition} *is executed, you will please to return it, addressed*

To the treasurer, or

To the paymaster of his Majesty's navy, London;

And specify and describe the receiver-general of the land-tax, collector of the customs, collector of the excise, or clerk of the check, whose abode is nearest to the person applying, who will be directed to pay {her / or him} the wages due to the deceased.

To A. B.

Minister of the parish of

N. B. If the application above-mentioned, was not attested by you, as stated therein, be pleased to return the enclosed {commission or / requisition} immediately, that means may be taken to discover the imposition.

Proctor, on receiving certificate and letter, to sue out a previous commission, and to transmit the same, with the letter, to the minister.

And the inspector, before he sends such certificate, as before directed, to the proctor, in Doctors' Commons, shall fill up the blanks therein, agreeably to the circumstances of the case; and the proctor or proctors to whom such certificate shall be addressed and sent, and which shall likewise enclose the letter to the minister, churchwardens, or elders, as aforesaid, shall, immediately upon receipt of the same, sue out the previons commission or requisition, or take such other proper and legal steps, as may be necessary towards enabling the person so applying for letters of administration, to the deceased intestate, to obtain the same, and shall enclose such previous commission or requisition, or other legal and necessary instrument, with instructions for executing the same, in the letter so to be addressed to the minister and churchwardens, or elders, and which had been transmitted to him by the inspector of seamen's wills, along with the aforesaid certificate, and shall forward such letter and inclosure as aforesaid, by the general post, agreeably to the address put thereon by the treasurer of the navy, the paymaster of the navy, or the inspector of seamen's wills.

Ministers, on receiving such commissions, to procure the execution of them, and transmit them to the pay office.

XVII. And be it enacted, by the authority aforesaid, That the minister and churchwardens, or elders, as the case may be, shall, immediately upon the receipt of such letter as aforesaid, with the previous commission or requisition, or other instruments inclosed therein, take such steps as to them may seem proper or necessary, for procuring the execution of such previous commission or requisition, or other instru-

ment transmitted by the proctor, to be executed, and being so executed, he or they shall transmit the same to the treasurer, or to the paymaster of his Majesty's navy, London; and if the person applying for such letters of administration shall be, and reside at a distance from the place where the wages, prize-money, or other allowances of money due to the deceased, are payable, he or they shall specify and describe the receiver-general of the land-tax, collector of the customs, collector of the excise, or clerk of the check, who may be most convenient, or nearest to such person applying for such administration; and the said treasurer, or paymaster of his Majesty's navy, shall, immediately upon the receipt thereof, send the said previous commission or requisition, or other legal instrument, executed by the person applying for the administration as aforesaid, to the aforesaid proctor, in Doctors' Commons, who, in pursuance thereof, shall forthwith sue out, and procure, letters of administration, in favour of the person so applying for the same, in the manner and form above-mentioned, to the estate and effects of the person who has so died intestate, as aforesaid.

Persons living at a distance from places where wages are paid, to describe the nearest receiver-general of the land-tax, &c.

Treasurer of the navy to send the previous commission when executed to the proctor, in order that letters of administration may be obtained.

XVIII. And be it enacted, by the authority aforesaid, That where any petty officer, seaman, non-commissioned officer of marines or marine, belonging, or who shall have belonged to any of his Majesty's ships, has died, or hereafter shall die, and shall have left a will or testament, appointing any executor or executors therein, any pay, wages, prize-money, or allowance of money, which may have been due, or owing to such testator, at the time of his death, shall not be paid over to, or recovered by, such executor or executors, but upon probates of such wills, to be obtained in the following manner; *(videlicet)* after such wills shall have been transmitted, inspected and lodged in the office of the treasurer of the navy, as directed by the afore-mentioned act of the twenty-sixth year of the reign of his present Majesty, the inspector of seamen's wills, and powers of attorney, shall issue, or cause to be issued, a check, in lieu thereof, with directions to return the same upon the testator's death, and to which check there shall be subjoined a blank certificate, to be signed by two reputable housekeepers of the parish, where such executor is resident, at the time such certificate

Executors to obtain probates of wills in the manner herein directed.

shall be so returned to the pay-office of the treasurer of the navy, certifying that they personally know and believe that he is the person described as executor in the said check; and also another blank certificate, to be signed by the minister of the said parish, and two of the churchwardens, or two elders of the same, as the case may be, certifying, that such two persons who certified, as above-mentioned, are resident within the parish, and of good repute; and such check and certificates shall be in the form and words following, or to the like effect:

No. CHECK.

Form of check to be given, on lodging wills at the navy pay-office.

IT being directed by acts of parliament, twenty-sixth George 3. chap. 63. and thirty-second George 3. chap. 34. That wills granted by petty officers and seamen, non-commissioned officers of marines, and marine, belonging to his Majesty's navy, shall be lodged in this office, for purposes therein specified; and that a check shall be issued for every such will, mentioning the particular heads thereof, which, by virtue of the said act, shall stand in place of the same;

this is therefore issued to shew receipt at this office, of a will, dated at upon the day of granted by A. B. *now of formerly of his Majesty's ship in favour of* C. D. *and appointing* E. F. *execut{or/rix} and which is attested by* G. H. *and* I. K. *The above* E. F. *upon the testator's death, is entitled, upon production of this check, to demand of this office, the wages, pay, or any other allowances due to the deceased; and that the above-mentioned will be directed and sent to a proctor, in Doctor's Commons, to obtain a probate thereof, which is also to be lodged in this office.*

WE hereby certify, That we personally know the above described E. F. *the present holder of this check; and that he is an inhabitant of this parish.*

L. M.
N. O.

Both inhabitants of the parish of in the county of

WE hereby certify, That the above L. M. *and* N. O. *are known to us, are housekeepers, and persons of good repute.*

Witness our hands,

At *this* *day* *of*	P. Q. *Minister.*
	R. S. } *Churchwardens*
	T. U. } *or Elders.*

If the testator dies after he leaves the naval service, a certificate of his burial, or some other authentic proof of his death, must likewise be sent to this office.

If the execut {or / rix} knows any proctor in Doctor's Commons, {he / or she} is desired to mention his name, that he may be employed in obtaining the probate.

The above certificates are to be filled up upon the testator's death, and the check to be sent by the general post, under cover, directed to the treasurer, or to the paymaster of his Majesty's navy, London.

On return of checks, &c. to the pay-office, the inspector to note the wages due, and forward the will to the proctor, with a letter in the following form.

And the said check having been, with the certificates, duly filled up, returned to the treasurer of the navy, or to the paymaster of the navy, in the event of the testator's death, and the said original will having been passed and stamped in the manner specified and directed by the aforesaid act, passed in the twenty-sixth year of the reign of his present Majesty, the inspector of seamen's wills, or the persons authorised to act for him, shall note thereon the amount of the wages due to the said deceased, and shall forward the said will to such proctor, or proctors, in Doctor's Commons, as aforesaid, together with a letter, addressed to the minister and churchwardens, or elders, as the case may be, of the parish within which the said executor or executors, applying for such probate of will, shall then reside; and the treasurer, or the paymaster of his Majesty's navy, or the said inspector, or either of them, shall frank the said letter, so as to carry the same, and the previous commission, or requisition, to be inclosed therein, free of charge for postage; and which letter, so to be addressed to the minister and churchwardens, or elders, as the case may be, shall be in the words, figures, and form following, or to the like effect:

No.

Navy Pay-office, 181

Rev. SIR.

Form of the letter.

HAVING received a check, formerly issued by this office, to which there are certificates annexed, attested by you, and two {churchwardens / or elders} *of your parish, certifying that* C. D. *also of your parish, is the person described in the said check, to be the execut* {or / rix} *to* A. B. *late a* {seaman / marine} *belonging to his Majesty's navy, and requesting that a probate of the will of the said* A. B. *may be granted.*

I am directed by act of parliament, of the thirty-second of George the third, chap. 34. to forward you the enclosed {commission / requisition} *and copy of the will, for the purpose of swearing the person so named execut* {or / rix} *accordingly.*

I am, Rev. SIR,

Your most obedient servant,

I. P. *Inspector.*

P. S. *When the* {commission / requisition} *is executed, you will please to return it, together with the copy of the will, addressed*

To the treasurer, or

To the paymaster of his Majesty's navy, London.

And specify and describe the receiver-general of the land-tax, collector of the customs, collector of the excise, or clerk of the check, whose abode is nearest to the execut {or / rix} *who will be directed to pay* {him / her} *the wages due to the deceased.*

To A. B.

Minister of the parish of

Proctor on receiving the will and letter, to sue out a previous

And the said proctor having received the said will, and the said letter, so written by the inspector, shall immediately sue out the previous commission, or requisition, or take such other proper and legal steps as may be necessary, towards

enabling the said executor, or executors, so applying for probate of the said will, to obtain the same, and shall enclose such previous commission, or requisition, or other legal and necessary instrument, with instructions for executing the same, as also a copy of the said will, in the letter so to be addressed to the minister, churchwardens, or elders, and shall forward such letter and enclosures as aforesaid, by the general post, agreeably to the address put thereon by the treasurer of the navy, by the paymaster of the navy, or by the inspector of seamen's wills.

commission, and to transmit the same with the letter to the minister.

XIX. And be it enacted, by the authority aforesaid, That the minister, and the churchwardens, or elders, as the case may be, shall, immediately upon the receipt of such letter, as aforesaid, with the previous commission, or requisition, or other instruments, enclosed therein, take such steps as to them may seem proper or necessary for procuring the execution of such previous commission, or requisition, or other instrument, directed by the proctor to be executed, and the same being so executed, he or they shall transmit the same to the treasurer, or to the paymaster of his Majesty's navy, London; and if the person applying for such probate of will, shall be, and reside at a distance from, the place where the wages, prize-money, or other allowances of money, due to the deceased, are payable, he, or they, shall specify and describe the receiver-general of the land-tax, collector of the customs, collector of the excise, or clerk of the check, who may be most convenient, or nearest to the person applying for such probate; and the said treasurer, or paymaster of his Majesty's navy, shall immediately, upon receipt thereof, send the said previous commission, or requisition, or other legal instruments, executed by the person applying for the probate, as aforesaid, to the aforesaid proctor in Doctors' Commons, who in pursuance thereof shall forthwith sue out and procure such probate.

Ministers, on receiving such commissions, to procure the execution of them, and transmit them to the pay office.

Persons living at a distance from places where wages are paid, to describe the nearest receiver-general of the land-tax; and treasurer of the navy to send the previous commission, when executed, to the proctor to obtain probates.

XX. And be it enacted, by the authority aforesaid, That when any person or persons, alleging him, her, or themselves to be creditor or creditors of any petty officer, seaman, non-commissioned officer of marines, or marine, dying intestate, or leaving a will, of which the executor or executors shall renounce the execution, or shall refuse to act thereupon,

Creditor desirous of administering to petty officers, seamen &c. must apply to the inspector of seamen's wills

and state the amount of his demand, &c.

shall, in that character be desirous of procuring letters of administration, or letters of administration, with will annexed, in order to receive any wages, pay, prize-money, or other allowances of money, of any kind, due to such petty officers or seamen, non-commissioned officers of marines or marine, in respect of services in his Majesty's navy, the same shall not be paid unto any such creditor or creditors as aforesaid, but upon letters of administration, or letters of administration, with will annexed, to be obtained in the following manner; *(videlicet)* such creditor or creditors shall apply by letter, or note, to the inspector of seamen's wills, stating the nature and amount of his demand; and if the person, upon whose account the wages, pay, prize-money, or other allowances are due, shall have died after he left the naval service, such creditor shall also exhibit a satisfactory proof of such death; and if he knows any proctor in Doctors' Commons, whom he may wish to employ, he shall mention his name to the said inspector, who shall further require a certificate, signed by two reputable housekeepers of the parish, where such creditor is resident, certifying, that they personally know him, and believe that he is the person whom he describes himself to be, and also another certificate from the minister of the said parish, and two of the churchwardens, or two of the elders of the same, as the case may be, certifying that such two persons who signed and certified, as above-mentioned, are resident within the parish, and of good repute; and upon receiving such certificates, together with a stated account, in writing, of such creditor's demand, he shall sign his name to such account, exhibited by such creditor, and shall also put a stamp thereon, in token of his approbation thereof; and every such account, and the vouchers exhibited by such creditor, shall be kept by the said inspector, as vouchers of the accounts of the treasurer of the navy, and such inspector shall immediately make, or cause to be made out, a certificate, stating the nature and amount of such creditor's demand upon the estate of such petty officer, seaman, non-commissioned officer of marines, or marine, as aforesaid, deceased, and shall sign and stamp, and forward the same to the proctor, or proctors, in Doctors' Commons, as shall have been named by such creditor, and he shall also

Inspector to sign the account, and make out a certificate of the demand, and forward it to a proctor, with a letter in the following form.

enclose, and send therewith a letter, addressed to the minister and churchwardens, or elders, as the case may be, of the parish within which the person applying as creditor, for such letters of administration then resides, and the treasurer, or paymaster of his Majesty's navy, or the said inspector, or either of them, shall frank the said letter so as to carry the same, and the previous commission, or requisition, or other necessary instruments to be inclosed therein, free of the charge for postage, and which letter so to be addressed to the minister, and to the churchwardens, or elders, as the case may be, shall be in the following words, figures, and form, or to the like effect:

No.

Navy Pay-office, 181

Rev. SIR,

HAVING received certificates, attested by you, and two {churchwardens / elders} *of your parish, from* C. D. *stating that he is resident therein, and desiring to administer to the effects of* A. B. *late of his Majesty's navy, as his creditor:* Form of letter.

I am directed by act of parliament of the thirty-second of George the third, ch. 34. to forward you the enclosed {commission / requisition} *for the purpose of swearing him accordingly.*

I am, Rev. SIR,

Your most obedient servant,

I. P. *Inspector.*

P. S. *When the* {commission / requisition} *is executed, you will please to return it, addressed*

To the treasurer, or

To the paymaster of his Majesty's navy, London.

And specify and describe the receiver-general of the land-tax, collector of the customs, collector of the excise, or clerk of the check, whose abode is nearest to the above creditor, who will be directed to pay that part of the wages due to the deceased, which {she / he} *appears by law entitled to receive.*

To A. B.

Minister of the parish of

Proctor to take the necessary steps to enable the creditor to obtain letters of administration, &c.

And the proctor, or proctors, to whom the aforesaid certificate shall be addressed and sent, and which shall likewise enclose the letter to the minister, churchwardens, or elders, as aforesaid, shall immediately, upon receipt of the same, sue out the previous commission, or requisition, or take such other proper and legal steps as may be necessary, towards enabling the person so applying as creditor, for letters of administration to such deceased, to obtain the same, and shall enclose such previous commission, or requisition, or other legal and necessary instruments, with instructions for executing the same, together with a copy of the will, in cases of administration with the will annexed, in the letter so to be addressed to the minister, churchwardens, or elders, and shall forward such letter and inclosures as aforesaid, by the general post, agreeably to the address put thereon, by the treasurer of the navy, paymaster of the navy, or the inspector of seamen's wills, and if it shall be necessary to cite the next of kin, notice of such citation shall be previously given to the said inspector, who shall point out one or more public papers, in which such citation shall be inserted.

Ministers and churchwardens to take the steps necessary for executing instruments, as directed by the proctor, and to transmit them to the treasurer of the navy, &c.

XXI. And be it further enacted, by the authority aforesaid, That the minister and churchwardens, or elders, as the case may be, shall, immediately upon the receipt of such letter, as aforesaid, with the previous commission, or requisition, or other instruments inclosed therein, take such steps as to them may seem proper or necessary, for procuring the execution of such previous commission, or requisition, or other instrument, directed by the proctor to be executed, and, being so executed, he or they shall transmit the same to the treasurer, or to the paymaster of his Majesty's navy, London; and if the person applying for such administration, shall be, and reside at a distance from, the place where the wages, prize-money, or other allowances of money, due to the deceased, are payable, he or they shall specify and describe the receiver-general of the land-tax, collector of the customs, collector of the excise, or clerk of the check, who may be most convenient, or nearest to such person, claiming such administration; and the said treasurer, or paymaster of his Majesty's navy, shall, immediately upon receipt thereof, send the said previous commission, or requisition,

Treasurer to send such instruments

or other legal instruments, executed by the person applying for the administration as aforesaid, to the aforesaid proctor, or proctors, in Doctors' Commons, who, in pursuance thereof, shall forthwith sue out, and procure, letters of administration, in favour of the person so applying, as creditor for the same, in the form and manner above-mentioned, to the estate and effects of the person who has died as aforesaid, but which letters of administration may, and shall, only entitle such administrator, as creditor, to receive such part of the estate of such petty officer, seaman, non-commissioned officer of marines, or marine, as shall satisfy the amount of the claim or demand, made by him as aforesaid, together with expences incurred in establishing his right as aforesaid, to receive the same, and the balance of such intestate's estate, (if any,) after satisfying the demand of such creditor, and expences incurred, shall remain in the hands of the treasurer of the navy, subject to the claim and demand of any other creditor, next of kin, or executor, to take and receive the same, when legally authorised so to do.

to the proctor, that letters of administration may be obtained.

Balance, after paying the claim of the creditor administering, to remain with the treasurer, &c.

XXII. And be it further enacted, That as soon as any letters of administration, or probates of wills, or letters of administration, with will annexed, have been obtained, and passed the seal of the proper court, in the manner herein-before directed, in the different events herein-before specified, the proctor, or proctors, who have sued out the same, shall immediately send such letters of administration, or probates of wills, or letters of administration, with the will annexed, addressed to the treasurer, or to the paymaster of his Majesty's navy, together with an account of his or their charges and expences, in obtaining the same, which said charges and expences shall not exceed the sum or sums herein-after allowed to be charged, in the different events herein-after specified; and the said treasurer, or paymaster of his Majesty's navy, upon receiving such letters of administration, or probates of wills, or letters of administration, with will annexed, shall direct the inspector of seamen's wills, or the person authorised to act for him, to issue, or cause to be issued, a check, containing the heads of such letters of administration, or probate of will, or letters of administration, with will annexed, as the case may be; and

As soon as letters of administration have been obtained and passed, the proctor to send them to the treasurer, or paymaster of the navy, who are to direct the inspector to issue a check, &c.

the said inspector, or the person authorised to act for him, shall note thereon the amount of the said proctor, or proctor's charges and expences, provided the same shall be at, and after the rates herein-after allowed to be charged, and likewise specify and describe upon the said check, the revenue officer, or clerk of the check, residing as aforesaid, nearest to the administrator, or executor, so to be named in such check, if such communication shall have been made to him; and in cases of letters of administration, or letters of administration, with will annexed, granted to creditors, he shall also note upon such check the amount due to such creditors, and which check, of letters of administration, or letters of administration, with will annexed, so prepared, shall be delivered over by him to the said administrator, and which check of probate of will shall be delivered over by him to the said executor, together with the copy of the will which had been transmitted to him by the proctor, or proctors, in Doctors' Commons, the said copy being first stamped by the inspector, if the said administrator, or the said administrator, with the will annexed, or the said executor, as the case may be, shall be present, or demand the same in person, but if he shall not be present, but be and reside at a distance, then, and in that case, the said inspector shall deliver such check, and such copy of will, to the deputy paymaster, and which shall be in the following form, or to the like effect:

No. CHECK.

Navy Pay-office, day of

Form of check.

IT being directed, by acts of parliament, twenty-sixth George the third, chap. 63. and thirty-second George the third, chap. 34. that letters of administration, and probates of wills, granted to the representatives of petty officers and seamen, non-commissioned officers of marines, and marines, belonging to his Majesty's navy, shall be lodged in this office, as vouchers to the treasurer, for payments made thereon, and that a check shall be issued for every such administration, and probate of will, and administration, with will annexed, specifying the particular heads thereof, which, by virtue of the said act, shall stand in place of the same;

This is therefore issued to shew receipt at this office of
{Letters of administration / Probate of will / Letters of administration, with will annexed.} *granted to* C. D. *of*
in the county of
as {Administrator / Executor / Administrator with will annexed} *of* A. B. *late of his Majesty's*
ship *dated* *day of*

No.

Remittance bill to be addressed to
at
The aforesaid {Letters of administration / Probate of will / Letters of administration, with will annexed} *were*
sued out by
Proctor in Doctors' Commons, whose charges amount to

I. P. *Inspector.*

To the deputy paymaster of the navy.

XXIII. Provided also, and be it further enacted, by the authority aforesaid, That where any sum, not exceeding the sum of ten pounds, shall be due for the services as aforesaid, of any petty officer or seaman, non-commissioned officer of marines, or marine, deceased, in order that the widow, next of kin, creditor, or person named as executor in any will or testament, of such petty officer or seaman, non-commissioned officer of marines, or marine, may not be put to great expence, it shall and may be lawful for the inspector of seamen's wills, after having taken the previous steps to ascertain the justness of their respective claims, to probate, or administration, or administration with will annexed, (in like manner as he has been herein-before directed to take, in cases of granting certificates to Doctors' Commons, for letters of administration, or letters of administration, with will annexed, or for probates of wills,) to issue, or cause to be issued, a certificate, in the following form, or to the like effect:

If the sum due exceeds not 10*l.* the inspector to issue a certificate.

Act of parliament, thirty-second George the third, chap. 34.

No.

CERTIFICATE.

Navy Pay-office, day of

Form of certificate.

HAVING duly examined a claim, presented to me as inspector of seamen's wills, &c. by A. B. *of in the county of stating that* {he / she} *is the of* C. D. *originally of and lately a* {seaman / marine} *belonging to his Majesty's ship and who died at on the*

I therefore hereby certify, That I believe the contents as therein stated, to be true, and also, that the said A. B. *is entitled to receive whatever wages, prize-money, and other allowances of money, may be due to the said deceased, provided the amount thereof does not exceed the sum of ten pounds,*

Remittance bill to be addressed to at

I. P. *Inspector.*

To the deputy paymaster of the navy, who shall take care to note hereon all sums which he shall pay, or cause to be paid, upon the authority of the same.

Certificate to be delivered to the widow, &c. if present, otherwise to the deputy paymaster.

And which certificate, so prepared, shall be delivered over by him to the said widow, next of kin, creditor, or person named as executor, if he or they shall be present; but if he or they shall not be present, but be and reside at a distance, then, and in that case, the said inspector shall specify and describe, upon the said certificate, the revenue officer, residing as aforesaid, nearest to such widow, next of kin, creditor, or person named as executor, and shall deliver such certificate to the deputy paymaster,

XXIV. And be it further enacted, That the said deputy paymaster, upon receiving such check, or such certificate, addressed to him, as the case may be, shall cause the whole of the wages due thereon, to be calculated and ascertained in the usual manner, in which calculation, consideration shall be had to the proctor's charge, if any such charge shall have been incurred, which shall be abated and deducted from the said wages, and be immediately paid to the said proctor, or some person authorised to receive the same on his behalf, and the amount due on such check, or certificate, as the case may be, being so ascertained, and the proctor's charge, where there may be any, being so deducted, the net balance, or that part of the net balance which may be due to the administrator, executor, widow, next of kin, or person named as executor, or creditor, shall immediately be paid to him or them, if he or they shall be present; and the check, or certificate, upon which the same was so paid, shall also be delivered to him or them, that it may be and remain in his or their hands, and stand in place, and instead of letters of administration, or probate of the will, or letters of administration, with will annexed, as an authority to receive whatever other sums may be due, or become due, to the estate of such deceased.

Deputy paymaster, on receiving checks, or certificates, to compute the wages due, and the balance to be paid, &c.

XXV. And be it further enacted, That in case the said executor or administrator, widow, next of kin, or creditor, or person named as executor, shall not be present, but be and reside at a distance, the said deputy paymaster, or treasurer's clerk, shall make out, or cause to be made out, a remittance bill, or bills, for the net balance, or that part of the net balance ascertained, as aforesaid, and which shall be in the following form, or to the like effect:

If the party reside at a distance, a remittance bill to be made out for the balance.

No.

Day of

SIR,

Form of remittance bill.

PAY to **B. C.** *of* *on* {his / her / their} *producing and delivering the duplicate hereof, the sum of* *being an account of the wages of* **D. E.** *belonging to his Majesty's ship the* *if the same be demanded within six calendar months from the date hereof, otherwise you are to return this bill to the treasurer of the navy, at the pay office of the navy, London.* | £. s. d.

To {
The receiver general of the land tax in the county of
The collector of the customs at the Port of
The collector of the excise at
The clerk of the check at
}

Signed F. G. *Commissioners of the navy.*
Attested H. I. *Clerk to the treasurer of the navy.*

By virtue of the act of the thirty-second of George *the third.*

N. B. *The personating or falsely assuming the name and character of any person entitled to receive the wages of any inferior officer or seaman, non-commissioned officer of marines or marine, or procuring any other to do the same, in order to receive wages due to such officer or seaman, non-commissioned officer of marines or marine, is made felony without benefit of clergy, by the thirty-second of George the third.*

The officer to whom the within bill is addressed, is directed by act of 32 Geo. 3. chap. 34. to examine the duplicate thereof when presented, and inquire into the truth, by the oath of the person presenting the same; and being satisfied, he is to testify to that purpose upon the back of the bill, and pay the amount without fee or reward[1]; but if he shall not be able to

pay the amount, from not having public money sufficient in his hands, he shall note the cause of his refusing payment, and shall appoint another day, within one month at furthest from that time, and shall deliver back the bill, so noted, to the person presenting it. And if, upon complaint to the commissioners, it shall appear that the officer to whom this is addressed has unnecessarily delayed payment, taken any fee, or made any deduction whatsoever, he shall be fined a sum not exceeding fifty pounds.

Remittance bill to be signed, &c. as in cases of parties desiring wages to be remitted at the pay of a ship, by 31 Geo. 2. c. 10, &c.

And which bill shall be signed, attested, forwarded and transmitted in the manner directed in cases of parties desiring their wages to be remitted at the pay of a ship, by the aforesaid act, passed in the thirty-first year of the reign of his late Majesty; and which remittance bills shall be made payable to such persons only as shall be expressed as administrators, executors, widows, next of kin, or creditors, in the check or certificate issued as before directed by the inspector; and all the money payable by the treasurer of the navy upon such check of administration or probate of will, with copy of will annexed, being made into a remittance bill or bills, the treasurer's clerk shall examine the said check, and if it shall appear that there are no further sums due by the said treasurer of the navy, but that the full sum due by him upon such authority has been paid and satisfied, his said clerk shall inclose the said check, together with the said copy of will, in the letter or cover which contains the bill of remittance, and forward it by the same conveyance to the administrators or executors, widows, next of kin or creditors, that it may be and remain in their hands, and stand in place and in stead of the original administration or probate of the will, as an authority to receive whatever other sums may be due or become due to the estate of such deceased.

On production of the duplicate of a remittance bill to any receiver general of the land tax, &c. within 6 months

XXVI. And be it enacted by the authority aforesaid, That as soon as the duplicate of any remittance bill or bills made out in favour of or granted in the manner herein-before directed in the different events specified, to any administrator, executor, widow, next of kin, creditor or person named as executor to any petty officer, seaman, non-commissioned officer of marines or marine, shall be produced and delivered

from the date, he shall examine into the truth of it upon oath, and pay the same without fee; but if not produced within six months the same shall be returned to the treasurer of the navy, &c.

to any receiver general of the land tax, collector of the customs, collector of the excise or clerk of the check, in Great Britain respectively, within six calendar months from the date thereof, he is hereby required and enjoined to examine such duplicate, and enquire into the truth thereof, by the oath of the person producing the same, which oath he is hereby authorised and directed to administer, and upon being duly satisfied to testify the same on the back of such bill, and immediately to pay the person or persons to whom such bills shall be made payable, and who shall be entitled to receive the same, without fee or reward on any pretence whatsoever, the sum contained in such bill, taking his, her or their receipt for the same on the back thereof, which bill so paid, upon being produced and delivered, together with the duplicate thereof, at the navy office, shall be immediately assigned for payment by three or more commissioners of the navy, and shall be immediately repaid by the treasurer of the navy to such receiver general of the land tax, collector of the customs, collector of the excise, clerk of the check, or to the order of any of them respectively, who shall have paid such bill; but in case the duplicate of such bill shall not be produced and delivered, and the payment thereof be demanded within six calendar months from the date thereof, then the said receiver general of the land tax, collector of the customs, collector of the excise or clerk of the check, shall return such bill to the treasurer of the navy, who shall cause such bill to be immediately cancelled, and from and after the cancelling thereof, the sum so contained in such bill shall accrue and become payable to such executor, administrator, widow, next of kin, creditor, or person named as executor to such inferior officer or seaman, non-commissioned officer of marines or marine for whose wages or pay it was made out, or to their lawful representatives in case they shall be dead, in the same manner as if such bill had never been issued.

If Receiver general, &c. shall not have money in hand when duplicates are tendered, he shall appoint a

XXVII. Provided always, and it is hereby further enacted by the authority aforesaid, That if any such receiver general of the land tax, collector of the customs, collector of the excise or clerk of the check to whom the duplicate of any of the bills herein-before directed to be made out and addressed to him as aforesaid shall be tendered for payment,

shall not then have in his hands public money sufficient to answer the same, and shall for that reason refuse or delay the immediate payment thereof, such receiver general, collector of the customs, collector of the excise, or clerk of the check, shall immediately indorse on the back of the said duplicate the day of its being so tendered to him, and the cause of his refusal or delay to pay the same, and shall appoint thereon, for the payment of such bill, some future day, within the space of one month at the farthest from the day of its having been first tendered to him as aforesaid, and such duplicate, with the indorsement thereon, shall immediately be delivered back to the person presenting the same; and if upon complaint to be made to the respective commissioners appointed by his Majesty, his heirs or successors, to manage the said several duties of the land tax, customs or excise, or to the commissioners of the navy, if the person complained of be a clerk of the check, it shall appear that such receiver general, collector of the customs, collector of the excise, or clerk of the check hath unnecessarily and wilfully refused or delayed the payment of such bill, or that such receiver general, collector of the customs, collector of the excise or clerk of the check, or any person employed by or under any of them, hath directly or indirectly received or taken any fee, reward, gratuity, discount or deduction whatsoever, on account of the payment of the said bill, it shall and may be lawful to and for any three or more of the said commissioners to convict and fine any such offender under their respective direction in any sum not exceeding fifty pounds, according to the nature and degree of the offence; and such fine shall be levied and recovered in such and the same manner, to all intents and purposes, as any conviction may be made, and any penalty or fine may be levied and recovered for any offence against any law by which any custom or excise is imposed or laid; and the said fine, when recovered, shall be paid to the informer or informers against such offender or offenders.

day for payment within a month, &c.

Penalty on receiver general, &c. delaying payment, or taking fees.

XXVIII. And be it further enacted, That all and every such bill and bills, duplicate and duplicates respectively herein-before directed to be made out and paid as aforesaid, shall be deemed and taken as good and sufficient vouchers

Bills and duplicates to be allowed in passing the accounts of

the treasurer of the navy. for the treasurer of the navy for so much money as shall have been so directed to be paid upon all or any such bill or duplicate respectively, and as shall have been paid by him thereon, and shall be allowed as such in passing his accounts.

Persons forging certificates, checks, &c. to suffer death. XXIX. And be it further enacted, That if any person, from and after the first day of August one thousand seven hundred and ninety two, shall falsely make, forge or counterfeit, or cause or procure to be falsely made, forged or counterfeited, or willingly act and assist in the false making, forging or counterfeiting any petition for a certificate, herein-before described or mentioned, to enable any person or persons to obtain letters of administration to any petty officer or seaman, non-commissioned officer or private of marines, who shall have served on board any ship or vessel of his Majesty, his heirs or successors, or shall utter or publish as true any petition for a certificate, herein-before described or mentioned, to enable any person or persons to obtain letters of administration to any such petty officer or seaman, non-commissioned officer or private of marines, who shall have served on board any ship or vessel of his Majesty, his heirs or successors, or shall falsely make, forge or counterfeit, or cause or procure to be falsely made, forged or counterfeited, or willingly act and assist in the false making, forging or counterfeiting any certificate for enabling him, her or them to obtain probate, or letters of administration with the will annexed, or any check, remittance bill or duplicate of remittance bill, or any certificate to the deputy paymaster, in respect of wages, prize money, and other allowances of money, not exceeding ten pounds, herein-before severally described or mentioned, in order to receive any wages, pay or other allowances of money, or prize money, due or supposed to be due, for or on account of the service of any petty officer or seaman, non-commissioned officer or private of marines, on board any ship or vessel of his Majesty, his heirs or successors, or shall utter or publish as true, any check, remittance bill or duplicate of remittance bill, or certificate, to the deputy paymaster, in respect of wages, prize money, and other allowances of money, not exceeding ten pounds, herein-before severally described or mentioned, in order to receive any wages, pay or other allowances of money, or prize

money, due or supposed to be due for or on account of the service of any petty officer or seaman, non-commissioned officer or private of marines, on board any ship or vessel of his Majesty, his heirs or successors, knowing the same to be false, forged or counterfeited; then every such person, being lawfully convicted of any such offence or offences, according to the due course of law, shall be deemed guilty of felony, and shall suffer death as a felon, without benefit of clergy.

XXX. And be it further enacted by the authority aforesaid, That, from and after the first day of August one thousand seven hundred and ninety-two, if any petty officer or seaman, non-commissioned officer of marines or marine, shall receive his pay, or shall attempt to receive the same or any part thereof, upon any certificate, purporting to be a certificate of servitude or a certificate of discharge, knowing the same to be forged or counterfeited, or if any such petty officer by himself, or by employing others, shall assist in the forging or counterfeiting of any such certificate, every such petty officer or seaman, non-commissioned officer of marines or marine, being thereof convicted, shall be punished as in cases of perjury.

Petty officers, seamen, &c. attempting to receive their pay on forged certificates, or assisting in forging them, to be punished as in cases of perjury.

XXXI. And be it further enacted by the authority aforesaid, That from and after the said first day of August one thousand seven hundred and ninety-two, no ecclesiastical court, proctor or proctors in such courts, nor any person or persons whatsoever, under any pretence, shall take and receive any more than the sum of fifteen shillings and two pence, for the seal, parchment, writing and suing forth the probate of any will, granted to the executors of any warrant, or any petty officer, seaman, non-commissioned officer of marines or marine, for the purpose of receiving wages or pay, or allowances of money of any kind which shall remain due to such warrant or petty officer, or seaman, non-commissioned officer of marines or marine, at the time of his or their death, for his or their services in his Majesty's navy, and for the pains, trouble, and expence attending the suing forth such probate, nor more than the sum of one pound four shillings and two pence for letters of administration, granted to the next of kin of any warrant or petty officer, seaman, non-commissioned officer of marines or marine, unless the

Sums to be paid for probates of wills, or letters of administration granted to executors or next of kin, &c.

goods and chattels of such warrant or petty officer, seaman, non-commissioned officer of marines or marine, do amount to the value of twenty pounds, nor more than the sum of one pound eight shillings and eight pence for any such probate granted to the executors of any warrant or petty officer, seaman, non-commissioned officer of marines or marine; nor more than the sum of one pound seventeen shillings and eight pence for any such letters of administration granted to the next of kin of any warrant or petty officer, seaman, non-commissioned officer of marines or marine, unless the goods and chattels of such warrant or petty officer, seaman, non-commissioned officer of marines or marine, do amount to the value of forty pounds; nor more than the sum of one pound eleven shillings and two pence for any such probate granted to the executors of any warrant or petty officer, seaman, non-commissioned officer of marines or marine; nor more than the sum of two pounds eight shillings and six pence for any such letters of administration granted to the next of kin of any warrant or petty officer, seaman, non-commissioned officer of marines or marine, unless the goods and chattels of such warrant or petty officer, seaman, non-commissioned officer of marines or marine, do amount to the value of sixty pounds; nor more than the sum of one pound thirteen shillings and eight pence for any such probate granted to the executors of any warrant or petty officer, seaman, non-commissioned officer of marines or marine; nor more than the sum of two pounds eleven shillings for any such letters of administration granted to the next of kin of any warrant or petty officer, seaman, non-commissioned officer of marines or marine, unless the goods and chattels of such warrant or petty officer, seaman, non-commissioned officer of marines or marine, do amount to the sum of one hundred pounds; and in all cases where it shall be necessary to issue commissions or requisitions to swear the executors or administrators of such warrant or petty officer, seaman, non-commissioned officer of marines or marine, no ecclesiastical court, proctor or proctors in such court, nor any person or persons whatsoever, under any pretence, shall take or receive more than the sum of fifteen shillings for the seal, parchment, writing and suing forth of any such commission or requisition, and

for the pains, trouble and expence attending the same, unless the goods and chattels of such warrant or petty officer, seaman, non-commissioned officer of marines or marine, do amount to the value of twenty pounds; nor more than the sum of one pound three shillings, unless the goods and chattels of such warrant or petty officer, seaman, non-commissioned officer of marines or marine, do amount to the value of one hundred pounds.

Sums to be paid for probates of wills or letters of administration, granted to widows, children, &c.

XXXII. Provided always, That no ecclesiastical court, proctor or proctors in such court, nor any person or persons whatsoever, under any pretence, shall take and receive any more than the sum of six shillings for the seal, parchment, writing, and suing forth the probate of any will granted to the executors of any warrant or petty officer, seaman, non-commissioned officer of marines, or marine, such executors being the widow, children, father, mother, brother, or sister of any such warrant or petty officer or seaman, non-commissioned officer of marines, or marine, for the purpose of receiving wages or pay, or allowances of money of any kind, which shall remain due to such warrant or petty officer, or seaman, non-commissioned officer of marines, or marine, at the time of his or their death, for his or their services in his Majesty's navy, and for the pains, trouble, and expence attending the suing forth such probate; nor more than the sum of fourteen shillings for the letters of administration granted to the widow, children, father, mother, brother, or sister of any such warrant or petty officer, seaman, non-commissioned officer of marines, or marine, unless the goods and chattels of such warrant or petty officer, seaman, non-commissioned officer of marines or marine, do amount to the value of twenty pounds; nor more than the sum of nineteen shillings and sixpence for any such probate granted to the executors of any warrant or petty officer, seaman, non-commissioned officer of marines or marine, such executor being the widow, children, father, mother, brother, or sister as aforesaid; nor more than the sum of one pound seven shillings and sixpence, for any such letters of administration granted to the widow, children, father, mother, brother, or sister of any such warrant or petty officer, seaman, non-commissioned officer of marines or ma-

rine, unless the goods and chattels of such warrant or petty officer, seaman, non-commissioned officer of marines or marine, do amount to the value of forty pounds; nor more than the sum of one pound three shillings for any such probate granted to the executors of any warrant or petty officer, seaman, non-commissioned officer of marines, or marine, such executors being the widow, children, father, mother, brother, or sister as aforesaid; nor more than the sum of one pound eleven shillings for any such letters of administration granted to the widow, children, father, mother, brother or sister of any such warrant or petty officer, seaman, non-commissioned officer of marines, or marine, unless the goods and chattels of such warrant or petty officer, seaman, non-commissioned officer of marines, or marine, do amount to the value of sixty pounds; nor more than the sum of one pound seven shillings and sixpence for any such probate granted to the executors of any warrant or petty officer, seaman, non-commissioned officer of marines, or marine, such executors being the widow, children, father, mother, brother or sister as aforesaid; nor more than the sum of one pound fifteen shillings and sixpence for any such letters of administration granted to the widow, children, father, mother, brother or sister of any such warrant or petty officer, seaman, non-commissioned officer of marines or marine, unless the goods and chattels of such warrant or petty officer, seaman, non-commissioned officer of marines or marine, do amount to the value of one hundred pounds; and in all cases where it shall be necessary to issue commissions or requisitions to swear executors or administrators, being the widow, children, father, mother, brother or sister of such warrant or petty officer, seaman, non-commissioned officer of marines or marine, no ecclesiastical court, proctor or proctors in such court, or any person or persons whatsoever, under any pretence, shall take or receive more than the sum of twelve shillings for the seal, parchment, writing, and suing forth of any such commission or requisition, and for the pains, trouble, and expence attending the same, unless the goods and chattels of such warrant or petty officer, seaman, non-commissioned officer of marines or marine, do amount to the value of twenty pounds; nor more than the

sum of fifteen shillings and sixpence, unless the goods and chattels of such warrant or petty officer, seaman, non-commissioned officer of marines or marine do amount to the value of forty pounds; nor more than the sum of sixteen shillings and sixpence, unless the goods and chattels of such warrant or petty officer, seaman, non-commissioned officer of marines or marine, do amount to the value of sixty pounds; nor more than the sum of eighteen shillings and sixpence, unless the goods and chattels of such warrant or petty officer, seaman, non-commissioned officer of marines or marine, do amount to the value of one hundred pounds.

No more than the sums herein specified (except as before-mentioned) to be paid for probates of wills or letters of administration granted to widows, &c. for estates under 100l.

XXXIII. And be it hereby further enacted, That, from and after the said first day of *August*, one thousand seven hundred and ninety-two, no ecclesiastical court, nor any person or persons whatsoever, save as herein-before mentioned, under any pretence, shall take and receive more than the sum of five shillings for the seal, parchment, writing, and suing forth of the probate of any will, or any letters of administration granted to the widow, children, father, mother, brother or sister of any such warrant or petty officer, seaman, non-commissioned officer of marines or marine, and for the pains, trouble, and expense attending the suing forth such probate or letters of administration, unless the goods and chattels of such warrant or petty officer, seaman, non-commissioned officer of marines or marine, do amount to the value of one hundred pounds; and in all cases where it shall be necessary to issue commissions or requisitions to swear the widow, children, father, mother, brother or sister, being executors or administrators of any such warrant or petty officer, seaman, non-commissioned officer of marines, or marine, no ecclesiastical court, nor any person or persons whatsoever, save as herein-before mentioned, under any pretence, shall take or receive more than the sum of five shillings for the seal, parchment, writing, and suing forth of any such commission or requisition, and for the pains, trouble and expense attending the same, unless the goods and chattels of any such warrant or petty officer, seaman, non-commissioned officer of marines, or marine, do amount to the value of one hundred pounds.

Bill of expenses on letters of administration granted to creditors, to be laid before the registers of the prerogative court, to be taxed, &c.

XXXIV. And be it further enacted and declared, by the authority aforesaid, That, in all cases where it shall be necessary to grant letters of administration, or letters of administration with will annexed, to any creditor or creditors of such petty officer, seaman, non-commissioned officer of marines or marine, the proctor or proctors suing forth, or causing the same to be sued forth, shall make out a bill of costs, which he or they may have actually paid for stamps, or fees in the ecclesiastical court, or otherwise or elsewhere, and which bill of expenses shall also contain an account of charges for his or their pains and trouble in every thing attending or relating to the suing out, or causing to be sued out, such letters of administration, or letters of administration with will annexed; which bill of expenses and charges the said proctor or proctors shall lay before the registers of the prerogative court of *Canterbury*, or certain deputies authorised to act for them, to be examined and taxed, and the said registers and deputy registers are hereby authorised to examine and tax the same; and which bill of costs and charges, after having been so examined and taxed by the said registers of the prerogative court of *Canterbury*, or by their deputies, or by any one of the said registers, or by any one of the said deputies; they shall certify the same, or that part of the same which remains after being so taxed, to be fair and equitable charges, according to the usual fees allowed, and customary charges made by proctors in *Doctors' Commons*, and then shall return the said letters of administration, or letters of administration with will annexed, and the said bill of expenses and charges, to the proctor or proctors who shall have so laid the same before them, and which bill of costs and charges shall be allowed to contain a fee of three shillings and fourpence to be paid to the said registers, or to the said deputy registers, who shall have so taxed and examined the same; and when the said proctor or proctors have finally obtained such letters of administration, or letters of administration with will annexed, granted to the creditors of such petty officer or seaman, non-commissioned officer of marines or marine, and such bill of expenses and charges, certified as herein directed, he or they shall forward such letters of ad-

Fee to register for taxing.

Proctors to forward letters of

ministration, and letters of administration with will annexed, and certificates of expenses and charges, to the treasurer, or to the paymaster of his Majesty's navy; and if any officer or officers, proctor or proctors, or any other person or persons, shall presume to take any more than the several sums herein-before allowed and directed to be taken in the different events specified, for the charges of probates, letters of administration, commissions and requisitions, in the manner herein particularly mentioned and expressed, the person or persons so offending shall forfeit to the party aggrieved the sum of fifty pounds, to be recovered with full costs of suit, by action of debt, bill, plaint or information, in any of his Majesty's courts of record at *Westminster*, or elsewhere; or if any register or other officer of any ecclesiastical court, shall knowingly and wilfully be aiding or assisting in procuring probate of the will or letters of administration, for the purpose of enabling any person or persons to receive the wages, pay, prize money, or allowance of money of any kind due, or becoming due for the services of any petty officer, seaman, non-commissioned officer of marines or marine, on board any ship or ships, then or formerly belonging to his Majesty or his predecessors, or heirs and successors, otherwise than in the manner prescribed by this act and the other act herein-before mentioned, passed in the twenty-sixth year of the reign of his present Majesty, every such proctor, register, or other officer, shall for ever after be incapable of acting as proctor, register, or in any other capacity, in any ecclesiastical court in *Great Britain*, and shall for every such offence forfeit and pay the sum of five hundred pounds, to be sued for, recovered and levied by action of debt, bill, plaint or information in any of his Majesty's courts of record at *Westminster*, and one half of every such penalty or forfeiture shall be and belong to his Majesty, his heirs and successors, and one half to him or them who shall discover, inform, or sue for the same.

administration and certificate of expenses to the treasurer or paymaster of the navy.

Penalty on proctors, &c. taking more than the prescribed sums for probates, &c. and on officers of the ecclesiastical court, procuring probates, &c. contrary to this act, or 26 Geo. 3. c. 63.

XXXV. Provided always, and be it further enacted by the authority aforesaid, That whenever any extraordinary pains, trouble or expense has attended the suing out letters of administration, or letters of administration with will annexed, to the widows or next of kin, or probates of wills

The treasurer or paymaster may allow a reasonable charge for extraordinary expenses, &c.

to the executors of any such petty officers or seamen, non-commissioned officers of marines or marine, the proctor or proctors who have sued out the same may, in consideration thereof, make an addition, in proportion to the said extraordinary pains, trouble and expense to his or their bill of charges and expenses, and which appearing reasonable, the inspector shall allow and pass the same; but if the same shall appear unreasonable or exorbitant to the treasurer or paymaster of the navy, in that case the said bill of charges and expenses shall be returned to *Doctors' Commons*, to be checked and taxed as aforesaid, by the registers or any one of them, or by the deputy registers or any one of them, who are hereby directed so to do without fee or reward, unless the said charges and expenses shall have arisen in consequence of any litigation or suit respecting the obtaining or suing out such letters of administration, letters of administration with will annexed, or probate of will, in which cases the said registers or deputy registers shall be permitted to charge and take the aforesaid fee of three shillings and fourpence.

So much of 26 Geo. 3. c. 63. as is not hereby repealed, to continue in force.

XXXVI. Provided always, and it is hereby expressly declared, That so much of the said act passed in the twenty-sixth year of the reign of his present Majesty, as is not repealed by this act, shall remain in full force and effect.

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39 & 40 Geo. 3. c. 98.

An Act to restrain all Trusts and Directions in Deeds or Wills, whereby the Profits or Produce of Real or Personal Estate shall be accumulated, and the beneficial Enjoyment thereof postponed beyond the Time therein limited.

[28th July, 1800.]

Preamble.

WHEREAS it is expedient that all dispositions of real or personal estates, whereby the profits and produce thereof are directed to be accumulated, and the beneficial enjoy-

ment thereof is postponed, should be made subject to the restrictions hereinafter contained: may it therefore please your Majesty that it may be enacted; and be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons in parliament assembled, and by the authority of the same, that no person or persons shall, after the passing of this act, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise howsoever, settle or dispose of any real or personal property, so and in such manner that the rents, issues, profits or produce thereof shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settler or settlers, or the term of twenty-one years from the death of any such grantor, settler, devisor or testator, or during the minority or respective minorities of any person or persons who shall be living, or in ventre sa mere at the time of the death of such grantor, devisor or testator, or during the minority or respective minorities only of any person or persons who, under the uses or trusts of the deed, surrender, will, or other assurances, directing such accumulations, would, for the time being, if of full age, be entitled unto the rents, issues and profits, or the interest, dividends, or annual produce so directed to be accumulated; and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits and produce of such property so directed to be accumulated, shall, so long as the same shall be directed to be accumulated contrary to the provisions of this act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed.

No person by deed or will, &c. shall settle or dispose of any real or personal property, in such manner that the rents or produce shall be accumulated for a longer term than herein mentioned, and any other direction shall be void, and the rents go to the persons entitled thereto.

II. Provided always, and be it enacted, That nothing in this act contained shall extend to any provision for payment of debts of any grantor, settler or devisor, or other person or persons, or to any provision for raising portions for any child or children of any grantor, settler, or devisor, or any child or children of any person taking any interest under any such conveyance, settlement, or devise, or to any direction touching the produce of timber or wood upon any lands or tenements, but that all such provisions and directions

Nothing herein to extend to any provision for payment of debts or for raising portions for children, or touching the produce of timber:

shall and may be made and given as if this act had not passed.

Nor to any disposition of heritable property in *Scotland.*

III. Provided also, and be it enacted, That nothing in this act contained shall extend to any disposition respecting heritable property within that part of *Great Britain* called *Scotland.*

When restrictions shall take effect with respect to wills made before the passing of this act.

IV. Provided also, and be it enacted, That the restrictions in this act contained shall take effect and be in force with respect to wills and testaments made and executed before the passing of this act, in such cases only where the devisor or testator shall be living, and of sound and disposing mind, after the expiration of twelve calendar months from the passing of this act.

II. PRECEDENTS OF WILLS

AND

TESTAMENTARY DISPOSITIONS.



No. I.

A convenient form of a Will, containing dispositions of real and personal Property, the whole to form one Fund, and go as personal Estate (1).

THIS is the last will and testament of me, Samuel H. of &c. I give and devise unto A. B., C. D. and E. F., their heirs and assigns, all my freehold and copyhold messuages, lands, tenements, and hereditaments, whereof I have power

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(1) Instead of settling freehold estates as land, (a mode which, where there are several persons and their families to be provided for who are equally the objects of the testator's care, is inconvenient, as well from the difficulty in the way of a specific division by metes and bounds, as from the embarrassment and expense which often arise from creating numerous undivided shares in tail) it is advisable to vest the lands in trustees, to be sold with the consent of those beneficially interested, with directions to place out the produce of such sale, after discharging debts and legacies, in the funds or on real securities, to pay the interest in certain proportions to the persons who are to have life interests, and after their deaths to pay

Of the advantage of treating al the property as personal.

No. 1.

to dispose, with their and every of their rights, members, and appurtenances, in possession, reversion, remainder or expectancy, to hold the same unto and to the use of them the said, &c. their heirs and assigns for ever, upon trust, that they, the said (trustees), or the survivors or survivor of them, or the heirs or assigns of such survivor (2), do and shall, as soon as conveniently may be after my death, sell and absolutely dispose of the same, together or in parcels, by public auction or private contract, as to them or him shall seem expedient, for the best price or prices, in money, that can be reasonably had or obtained for the same respectively, and respectively to convey and surrender the same accordingly. And I will and declare, that the receipt or receipts of the said (trustees), or the survivors or survivor of them, or the heirs or assigns of such survivor, for the money for which the same shall be so respectively sold, shall from time to time be a sufficient discharge (3), or sufficient

Real estate to trustees and their heirs to sell and convert the same into money.

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over the principal in equal shares among the children, with such other provisions as are exemplified in this will; and no sale need be made till the convenience of the parties calls for it, or a proper occasion offers itself.

(2) If lands are devised to be sold and nobody appointed to sell, it is the province of the executors, and a court of equity will compel all proper parties to join in the sale, 1 Atk. 490. The word 'dispose' does not of itself import a direction to sell, but to manage the estate, 3 Atk. 287.

Of the clause for discharging purchasers, and their liability, in the absence of such clause, to look to the application of the purchase-money.

(3) This clause ought never to be omitted, for though where it is not inserted, the purchasers from the trustees are justified at law in paying their money to the trustees; yet, in equity, they are, in certain cases, considered as responsible for the application of the money according to the trusts. They have been held liable in most cases, where there is a specification of the debts to be paid with the produce of the sale, but not where the trust is to pay debts generally, even though they have notice of the debts; nor are the purchasers bound where the trust is to pay debts generally, *and also legacies*, for though these last are specified objects, yet they are coupled with others which are unascertained, and they shall not involve the purchaser in the account of the debts: neither is

No. 1.

discharges, to the purchaser or purchasers of the said several premises herein-before made saleable by this my will, or any part or parts thereof, for his, her, or their purchase money, or so much thereof as shall be therein acknowledged or expressed to have been received; and that such purchaser or purchasers, his or their heirs, executors, administrators

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the purchaser bound to see to the application of the purchase money, where the debts are *charged* generally upon the estate, though the contrary seems formerly to have been held, 6 Vez. Jun. 654, n. But where lands are charged with the payment of *annuities*, they are liable in the hands of purchasers; for the object of making the lands a fund for the payment in this case, was that there should be a constant and subsisting fund, Barnard, 82. 5 Vez. Jun. 130, Wynn *v.* Williams. These appear to be the most important distinctions.

Where trustees for sale are also made executors; and of the statute 21 Hen. 8. c. 4.

A few further remarks on these trusts for sale may not be without use to the student. He will observe that the power of sale is generally given to the same persons as are named executors; and where that is the case and the subject is leasehold, there is no doubt but that any one, or any part of the executors, may alien the legal estate without the concurrence of the rest of the number; and this, not by reason of their interest as trustees, because *as such* they are merely joint-tenants, and can only sever the jointure and alien their respective undivided shares, but by reason of their office of executors; for the particular power might in such case be said to flow into and be lost in their authority as executors, or perhaps more properly to give place and precedence to that general power which executors possess, ratione officii, over all chattels.

Where the subject of the power was freehold some regard was also had at common law to their office of executor; and to some purposes, even the power of disposing of freehold seems to have been considered as vesting in them, ratione officii. For this reason, it seems that if a power to sell lands were given to two executors, and one died, this power was by the better opinion held to survive, and to be transmissible to the executors of the survivor. Whether part of the executors could sell the whole of such property without the rest, was a doubt at common law, as appears by some of the books, but particularly from the recital of the statute 21 H. 8. c. 4. which was made to put an end to these doubts.

No. 1.

That the monies arising by the sale shall be

or assigns, or any of them, shall not afterwards be answerable or accountable for any loss, misapplication or misapplications of such purchase money so received, or any part or parts thereof. And my will further is, that the monies which shall arise by or from such sale or sales as aforesaid, shall be deemed to be part of my personal estate; and that the clear

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That statute, reciting that, *according to the opinion of divers persons*, where a testator had devised his lands to be sold by his executors, a bargain and sale would in no wise be effectual unless made by the whole number of the executors, for remedy thereof enacts "that all bargains and sales by those who accept the charge without the rest, shall be as good and effectual in law as if the rest had joined." This statute has always been construed largely and liberally as a very beneficial law; and thus though it expressly provides only for cases where the lands are willed to be sold by the executors, yet the settled construction has extended to cases where the will devises the lands to executors to be sold. Thus Lord Coke, in commenting on the 169th section of Littleton, p. 113, b. makes the following observations on this statute: "In Littleton's case admit that *one* executor had *refused to sell*, then as the law stood when Littleton wrote, it was clear that the others could not sell, but now by the statute it is provided that where lands are willed to be sold by executors, though part of them refuse, yet the rest may sell; and albeit the letter of the law extendeth only to where executors have a power to sell, yet, being a beneficial law, it is by construction extended to where lands are devised to executors to be sold." And the construction has been still further enlarged; for it has been held that where lands are devised to trustees to be sold, and the same persons to whom the lands are so devised, are in another part of the will made executors, the statute will extend to this case. Thus, in Bonifaut *v.* Sir Richard Greenfield, Cro. El. 80, the case was this: "a testator seised of the manor of D. devised the same to I. S. and three others, and their heirs, to the intent that the trustees should sell it for the best profit, and apply the money as therein mentioned; and in the conclusion of the will he made the same four persons his executors, and died. One of the four refused to meddle with the will or sale, and the other three sold the land in the life-time of the fourth, and whether the sale was good was the question.

yearly rents and profits of the said hereditaments and premises, in the mean time, until the same shall be sold, or of so much thereof as shall be remaining unsold, shall be deemed to be part of the annual income of my personal estate; and that the same monies, and rents and profits, shall be subject to the dispositions hereinafter made concerning

No. 1.

personal estate, and, until sold, the rent shall be considered as the income of the personal estate, and

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The case was argued by Popham and Egerton, and it was adjudged that the sale was good by the three executors, either by the common law, or by the statute 21 H. 8. c. 4.; for when he devises the land to four to sell, and afterwards makes them his executors, this doth tantamount as if at the first he had devised that such his executors should sell; and in such a case at the common law, the sale by three, the fourth refusing, was good; for these three may perform the will without the fourth, but the statute makes it clear." See the remark of Lord Kenyon on this statute, viz. that the law before the statute, was considered as doubtful, and that the statute was made rather to remove doubts than to make a new law. 6 T. R. 396.

It is proper however to add, that though such a sale by one or some of the trustees and executors, the rest refusing, should seem to be good and valid to carry the whole legal estate and interest, yet where the receipts of the trustees are, by the deed, made discharges to the purchaser, there may be doubts whether he would be safe in paying his purchase money without a receipt and acknowledgment in which all are joined.

Of the conversion of real into personal estate, in equity, when partial and when total.

It is a general rule, that where property is devised to be sold by the trustees for particular purposes, as for payment of debts and legacies, nothing more is subject than those purposes require, and the personal estate must first be applied. There is, in these cases, therefore, always a resulting trust of the residue, after the purposes are answered: the real results to the real, and the personal to the personal representative; and if the personal is sufficient to answer all the purposes, the whole real estate results and descends to the heir, or goes to the residuary devisee. And by the way it may be here noticed, that this residue is not like the residue that arises by lapse, in respect to which there is a difference between real and personal estate, as has before been observed.

But sometimes by the effect of the dispositions of the will, as where there are ulterior general purposes to be answered by the

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that the said monies, rents, &c. shall be subject to the dispositions after mentioned

my personal estate, and the annual income thereof, respectively. And as touching my personal estate remaining after payment of my debts, funeral and testamentary charges, and the legacies hereinafter bequeathed, I give the same to the said trustees, their executors, administrators and assigns, upon the trusts, and for the intents and purposes, and under

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sale, which require the estate to be converted, as is the case in the will to which this note is attached, the real estate by the direction to sell is made personal estate *out and out* as it is usually expressed. And then there is no resultancy for the heir at law, but the character of personalty is impressed upon it to all intents and purposes; and if there is a residue it goes with the residuary bequest, or if there is no disposition of the residue, the mere appointment of an executor is sufficient to carry it to him, either for his own benefit, or as trustee for the next of kin; which question, between the executor and next of kin, has been discussed in a preceding chapter under its proper title; see 2 Bro. C. C. 589, and 1 Vez. Jun. 44, Robinson *v.* Taylor, and see 11 Vez. Jun. 87, Berry *v.* Usher. The truth is, when the estate is only devised to be sold to pay debts and legacies, it is considered as in the nature of a charge only, 3 Vez. Jun. 210, Haldemand *v.* Hudson.

Of the rule in respect to trustees becoming purchasers

A trustee for sale, as long as he retains that character, is never permitted to purchase for his own benefit. And though in a particular case there may be the most satisfactory evidence that the transaction amounts to no more than what the general interests of justice and of the parties would warrant; yet, as the powers of the court would not be equal to protect against deception, from the impossibility of knowing the truth in every case, the rule of exclusion must of necessity be universal. The ground of the rule is, that the situation of the trustee gives him the opportunity of knowing the value of the estate he is to buy, better than the cestui que trust, and therefore they do not deal on equal terms; besides which, he is by his trust bound to apply his knowledge for the benefit of his cestui que trust; and therefore he cannot be permitted to make a bargain adversely with the party whose interest he is in conscience obliged to promote. But the trustee may shake off the character of a trustee by a previous agreement with his cestui que trust, if of age and capable of discharging him, (though it may be difficult to determine when that has been done effectually) and

No. 1.

and subject to the powers, provisoes, declarations and agreements hereinafter expressed and declared, of and concerning the same, that is to say, upon trust that they, the said (trustees), or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall place out and invest the same in or upon any of the parliamentary stocks or funds of Great Britain, or on real securities in England, at interest, and do and shall vary, alter or transpose (4) such stocks, funds or securities for others of the like nature, when and so often as it shall seem expedient; and do and shall pay the interest and dividends of the said stocks, funds and securities, unto such person or persons only, and for such intents and purposes only, as my daughter, E. H. by any writing or writings under her hand, from time to time, shall direct or appoint, notwithstanding any coverture she may be under; and in default of such direction or appointment, and in the mean time until she shall make any such direction or appointment, do and shall pay the same, or so much whereof she shall or may from time to time happen to make no such appointment, into the proper hands of my said daughter, exclusively (5) of any husband she may happen to marry, who is not to intermeddle therewith, nor is the same or any part thereof to be subject or liable to such husband's controul, debts, or engagements.

as to the personal property. And as to his personal estate remaining after payment of debts and legacies, and funeral and testamentary charges.

To the trustees upon trust to invest the same in the public funds.

With power to vary the securities.

To pay the dividends to the testator's daughter for life, for her separate use.

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put himself in circumstances in which he will no longer be the person intrusted to sell, and then, it seems, he will be permitted to purchase; see the cases ex parte Bennett, 10 Vez. Jun. 381. and Sanderson *v.* Walker, 13 Vez. Jun. 601.

Of the propriety of giving the power of varying the securities.

(5) If a trustee of stock take upon him to transfer at all without such a power he is guilty of a breach of trust, and the cestui que trust is intitled in equity to his election, either to have the individual stock restored to him, or to have the money it produced; 2 Atk. 121, Harrison *v.* Harrison, 2 Bro. C. C. 653, Bostock *v.* Blakeney, 1 Vez. Jun. 297, Powlet *v.* Herbert, 4 Vez. Jun. 497, Long *v.* Stewart, 5 Vez. Jun. 800, (n).

Where no trustee appointed.

(6) Where no trustee happens to be appointed for the wife to whose separate use property is devised, the husband becomes a trustee for the wife; 2 P. Wms. 316.

No. 1. And I will and declare, that the receipts of my said daughter, or of such person or persons as she shall, or may, from time to time, direct or appoint to receive such dividends or interest, shall, notwithstanding any such coverture, be good and effectual releases and discharges for the same, or so much thereof, as in such receipts shall be expressed to be received; and from, and immediately after the decease of my said daughter, upon trust, that they, the said trustees or trustee, for the time being, do and shall pay, or transfer, all such principal monies, stocks, funds, and securities, unto all and every the child, or children, of the body of my said daughter, lawfully to be begotten, equally to be divided between, or among them, share and share alike, if there shall be more than one; and if there shall be but one such child, the whole to be paid or transferred to such one child; the share or shares of such of them, as shall be a daughter, or daughters, to become vested in her or them respectively, on her or their attaining her or their age, or respective ages of 21 years, or on the day, or respective days, of her or their marriage, which shall first happen; and the share or shares of such of them, as shall be a son, or sons, to become vested in him or them respectively, on his or their attaining his or their age, or respective ages, of 21 years, and to be paid or transferred at such age or ages, time or times, as aforesaid, to such of the said daughters or sons, as shall arrive at, or attain, the same, after the decease of my said daughter; but as to such of them as shall arrive at, or attain such age or ages, time or times, as aforesaid, in the life-time of my said daughter, the payment or transfer of his, her, or their share or shares, to be postponed till after her decease: provided, and I do hereby declare my will to be, that if any such child, or children, being a son or sons, shall depart this life before he or they shall attain his or their respective ages of 21 years, or being a daughter, or daughters, shall happen to die before she or they shall attain her or their age, or respective ages of 21 years, or be married, then the share or shares of him, her, or them so dying, shall go and accrue to the survivors or survivor, or others or other, of such children, and be equally divided amongst them, if more than one, share and share alike; and the same shall become vested and pay-

And after the daughter's decease to transfer the principal to and among her children in equal shares.

The respective shares to become vested at 21, or marriage.

With accruer by survivorship.

able, or transferable, at such ages, days, and times, as his, her, and their original portion and portions are hereby directed to become vested and payable, or transferable, as aforesaid; and in case of the death of any other of the said children of my said daughter, before such accruing or surviving share, or shares, shall become vested as aforesaid, then every such accruing or surviving part, or share, shall again be subject, and liable to such right, chance, contingency, or condition, or accruer to, and amongst the survivors or survivor (7), and others, or other, of the said children, as herein-before is provided, touching the said original portion, or portions; and upon further trust, that the said trustees, or trustee, for the time being, do and shall, after the decease of my said daughter, pay and apply the dividends or interest of the share, or shares, of such of the said children as shall not have acquired a vested interest in the portion, or portions, herein-before provided, or intended for him, her, or them, respectively, for, and towards, his, her, or their maintenance and education, respectively, until the same respectively shall become payable. Provided, that if there shall be no child of the body of my said daughter, lawfully begotten, or there being one or more such child or children, and such of them as shall be a son or sons, shall happen to die before he or they shall attain the age of 21 years, and such of them as shall be a daughter, or daughters, shall happen to die before she or they shall attain her or their age, or respective ages of 21 years, or be married, then, and in such case, it is my will, that they, the said trustees, or trustee, for the time being, shall pay or empower ———, to receive the dividends, or interests thereof, during her life, and from and immediately after her decease, do, and shall raise the sum

No. 1.

Provision for maintenance.

In case of there being no child to take the benefit of the before-mentioned trust, then to pay the testator's mother the dividends.

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(7) A. gives 1000*l*. among four persons, as tenants in common, and directs, that if one of them dies before 21, or marriage, it shall survive to the other; if one dies, and three are living, the share of that one so dying, will survive to the other three; but if a second dies, nothing will survive but his original share, for the accruing share is a new legacy, 3 Atk. 80. 2 Ch. Rep. 131. 1 P. Wms. 275. Ca. temp. Talb. 124, 1 Bro. C. C. 575. The will, therefore, must specially provide for this.

Of the clause making accruing shares subject to survivorship.

No. 1.

And after her decease to raise the sum of —*l.* for —— and to divide the surplus among — and —

Proviso, in case of the daughter's being a minor at testator's death, for applying the dividends for her maintenance until her coming of age.

of ——*l.* of lawful money of Great Britain, and pay the same to my nephew D., his executors, or administrators, and do, and shall pay, or transfer, one third part of the surplus thereof, to ———, her executors, or administrators, one other third part to ———, her executors, or administrators, and the remaining third part thereof, to ———, her executors, or administrators; provided, that in case my said daughter shall be in her minority, and unmarried at the time of my decease, the said trustees, or trustee, for the time being, shall apply the dividends, or interest of such principal monies, stocks, funds, or securities, as aforesaid, for, or towards her maintenance and education, until she shall attain her age of 21, or shall be married; provided further, that it shall be lawful for my said trustees, or trustee, for the time being, in case my said daughter shall marry, (so as such marriage, if she shall be under the age of 21 years, shall be had with the consent (8) of her guardians or guardian,) to

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(8) A point has been made, whether notice to the party was necessary or not; and it has been decided to be not necessary. Williams *v.* Fry, 1 Mod. 86. In adverting to Frances's case, 8 Rep. 92. where it was ruled, that the party ought to have notice, the chief justice observed, that in that case, the party to be excluded, was the heir at law, but not so in the case before him, p. 88. In the case above-mentioned, evidence was produced to shew, that the trustees gave consent after the marriage; but Lord Vaughan observed, that the post consent was nothing, for consent cannot be had of things which cannot be otherwise; a man cannot be said to consent to his stature, or the colour of his hair. 1 Mod. 312. But as to this point, respecting the operation of post consent, there may, perhaps, be a difference between a restriction upon marriage without consent, and against consent. See Fleming *v.* Waldegrave, 1 Ch. Rep. 58. cited 2 Vern. 573. It is the doctrine of the ecclesiastical courts, and of the civil law, that matrimony should be free, and courts of equity lean towards the same doctrine, making a distinction, however, between conditions absolute, and conditions followed by a devise over, to which Lord Hale gave the appellation of conditional limitations. Thus, where a testator devised 3000*l.* to his daughter, at 21, or marriage, provided she married with the consent of B. and if she married without such consent, then she was

raise, by and out of the said principal money, stocks, funds, or securities, the sum of —*l.* of lawful money of Great Britain, and to pay the same upon, or immediately after, such marriage, to such person or persons, and for such purposes, as my said daughter, by any writing, or writings, under her hand, attested by two or more credible witnesses, shall di- No. 1.

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to have only 500*l.* and the 3000*l.* legacy was to cease. The daughter married without consent, yet the whole 3000*l.* legacy was adjudged to her, because it was not devised over, but only to fall into the surplus, Garret et Ux. *v.* Pritty, 2 Vern. 293. And this case was cited and confirmed, 1 Atk. 375. But where there was the devise of a legacy to a daughter, but if she married without her mother's consent, then 500*l.* of the daughter's legacy was to go to the son, there, upon the daughter's marrying without the mother's consent, it was decreed that the son should have the 500*l.* for it was said by the court that it was not to be taken as a clause in terrorem only, but that the 500*l.* devised over was well devised over, being an interest vested in the ulterior devisee, 2 Vern. 357. Stratton, *v.* Grymes; 3 Atk. 367. In a subsequent case, where a portion was given to a daughter, with a like restriction, if she married without consent, without any limitation as to time, followed by a disposition of the portion to another person, upon breach of the condition, the court held. that the marriage, without consent, was such breach of the condition, and that though a condition subsequent, the court could not relieve against the forfeiture, by reason of the devise over; although it was a hard condition, no time being limited, and extending to a marriage even after the age of 21. Aston *v.* Aston, 2 Vern. 452. It has been held that a devise of the residue is equivalent to a devise over. Ames and Harmer, 1 Eq. Abridg. 112. Wheeler, *v.* Bingham, 3 Atk. 364. Scott *v.* Tyler, 2 Bro. C. C. 431.

In our own law a distinction has always been taken between the cases, wherein the condition has been precedent, and wherein it has been subsequent. And, generally, this seems also to have been the sense of the civil law. For where a legacy was given upon a precedent facf, which might, or might not happen, or directed to be paid at a certain time, which might or might not come, if the fact required did not happen, or the time required never came, by the civil law the legacy was lost. Dig. L. xxxvi. Tit. 2. l. 21, 22. L.

No. 1. rect; and I give the following legacies, that is to say, I give to my mother 300*l.*; to my three sisters 100*l.* a-piece; to my nephew, J. H——, 300*l.*; to my niece S—— 100*l.*; to Mrs. B—— and her daughter, 20*l.* a-piece, for a ring; to Mr. N—— 50*l.*; and to each of my executors, hereinafter appointed, 50*l.* And I appoint the said —— executors

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Of conditions in restraint of matrimony.

xxxv. Tit. 1. l. 41. By Ulpian. But in respect to restraints upon matrimony, the civil law made no distinction between conditions precedent, and conditions subsequent, however it might admit such distinction in other cases. While in the decisions of our own courts, this distinction has been applied to matrimony, as well as to other cases. In the case of Gillet, *v.* Wray, 1 P. Wms. 284, one by will left to his grand-daughter, an annuity of 10*l.* and afterwards, by a codicil to his will, declared, "that if his grand-daughter should marry with the good-liking of his trustees, then she should have 150*l.* and her first annuity should cease." The grand-daughter afterwards married a man without the consent of the trustees, and Lord Cowper would not relieve against the condition. And it seems, from that case, that where the condition is in the affirmative, and introduced with the conjunction *if*, it is a condition precedent. But it may be seen from the case of Taylor *v.* Bury, 2 P. Wms. 625, that the Courts will gladly lay hold of circumstances, to avoid the construction of a condition precedent, in cases of restriction upon matrimony. In that case, one devised the residue of his personal estate to I. S. provided she married with the consent of his *two* executors. One of them died, and she married without the consent of the survivor. This was considered as a condition subsequent, and the grounds upon which it was so considered, were two: first, that it was the devise of the residuum, which, if the condition were held to be precedent, might not have vested till 20 or 30 years after the testator's death. 2nd. That the bequest was first to I. S., which, if the will had stopped there, would have been an absolute devise, and the condition annexed followed the devise. And thus considering it, the rule of law applied, viz. that if a condition subsequent becomes impossible, by the act of God, the grantee is excused from the condition. In this case it became impossible, inasmuch as the consent of both executors was required, and one was dead. These distinctions between conditions precedent and subsequent, were taken in the case of Long *v.* Dennis, 4 Burr. 2052: but all the court in that case

of this my last will and testament. Provided, and my will is, that if the said, &c. or any of them, or any of their heirs, executors, administrators, or assigns, or any trustees or trustee, to be appointed in the stead or place of any of them, as herein-after is mentioned, shall die, or be desirous of being discharged from, or refuse, or decline to act, or become in-

No. I.

Proviso for changing trustees and for their indemnity.

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agreed, that all conditions in restraint of marriage, are to find no favour in any court of justice. There the condition was, that "in case I. S. should marry with any woman, not having a competent marriage portion, or without the consent and approbation of the trustees, to be expressed in writing," then the estate was to go over. Lord Mansfield said the construction must be to vest the estate, in case I. S. married a woman of competent fortune, or had the consent and approbation of his trustees to marry a woman without one; and I. S. having married a woman with a competent portion, though without the consent of the trustees, it was adjudged, that a compliance with either part of the alternative, was a performance of the condition. It may be worthy of remark, that in this case, it was declared by the testator, that the condition should not be construed in terrorem, which express caution, the chief justice said, made it doubly in terrorem.

Where conditions of this sort respect interests in lands, such conditions shall prevail, and it will make no difference, whether it be precedent or subsequent, or whether there be or be not a devise over: which is a doctrine in conformity with the rule, that portions or legacies charged upon lands, do not vest until the period of payment arrives. And with respect to personal legacies, where the condition in restraint of marriage, is followed by a devise over, the rule is the same; but where, in the case of personalty, the condition be considered as subsequent, and there is no devise over, the courts will construe such a condition in terrorem; and it is said that the doctrine is grounded upon an inclination in the court of chancery, to conform to the maxims of the civil law, and ecclesiastical courts, in this respect. It is to be observed, however, that this conformity is not maintained throughout; since, whether there be a gift over or not, makes no difference in the decisions of the ecclesiastical court. But it may be doubted, whether it is quite correct to say, that the ecclesiastical court recognises no distinction between conditions precedent, and conditions subsequent, in respect to this question. The truth seems

No. 1. capable of acting in the trusts of this my will, before the same respectively shall have been fully executed, performed, or discharged, then, and in such case, and so often as the same shall happen, it shall and may be lawful, to and for the person, or persons, who, for the time being, shall be entitled to the dividends, or interest, of the residue of my personal

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to be, that where the title to the legacy is made to depend upon the marriage, with consent, although the ecclesiastical court, notwithstanding its favour towards matrimony, yields to the necessity of considering marriage as a proper condition precedent, so that in such case, until marriage, the legacy shall not vest; still it regards the matter of consent, which operates as a restraint upon the marriage, as no integral part of the condition, but rather as a circumstance and an appendage. But it does not appear, upon an attentive perusal of the great aggregation of cases, which bear upon this subject, that our law has followed the ecclesiastical court to this extent, but with more propriety, wherever the condition is clearly, and unavoidably, a condition precedent, it regards the necessity for the consent, whether required by settlement, or will, as an integral part of it. This seemed to be the firm opinion of Lord Chief Baron Comyns, in the great case of Harvey *v.* Aston, Comyns, 726. and also of the chancellor and judges in the case of Scott *v.* Tyler, 2 Brown, 431. in which the reader will find the legal reasons for so considering this point learnedly expounded, in the very elaborate argument of Mr. Hargrave. And see the case of Creagh et Uxor *v.* Wilson, 2 Vern. 572. which was relied upon by Chief Baron Comyns. It is to be lamented, however, that this part of the question has been left in some uncertainty, an uncertainty not a all removed by the note of Mr. Serjeant Williams to the case of Harvey *v.* Aston, in Lord Talbot's cases, which seems in some respects to be an incorrect view of the doctrine. Nor can his position be maintained, that in the case of land, whether the condition be precedent, or *subsequent*, the interest can never vest, until the condition be performed; for when we say that the condition is *subsequent*, we inclusively say that the interest is *vested.* Mr. Sanders's note to Harvey *v.* Aston, 1 Atk. 380, is more intelligent and correct, though we cannot accede to the opinion expressed in that note, that a condition, involving such constraint, and plainly precedent, is only allowed by courts of equity to be effectual,

estate, if such person or persons shall be of full age; and if not, then for the guardians, or guardian, of such person, or persons, by any writing, or writings, under their, his, or her hands and seals, or hand and seal, to nominate, substitute, and appoint, any other person, or persons, to be a trustee, or trustees, in the stead or place of him, or them, so dying, No. 1.

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where it substitutes a less for a greater legacy. A distinction that supposes a principle of law, can never, without a great sacrifice of certainty and consistency, be made to vary with the varying circumstances of the cases.

We should not finish this note without adding, that wherever a trustee, invested with the power of restraint, withholds his consent without just cause, or on improper grounds, a court of equity will supply such consent. See Peyton *v.* Bury, 2 P. Wms. 628. And 1 Atk. 375. 2 Atk. 16. And more particularly where the executor appears to have an interest operating on his behaviour in this respect, Long *v.* Dennis, 4 Burr. 2052. If an absolute consent be given it is irrevocable. Dashwood *v.* Bulkeley, 10 Vez. 242. And if a conditional consent be given, and the condition be performed, such consent becomes absolute. But if a trustee consents to a marriage, on condition of a settlement being made, and such settlement is refused to be made, and the consent in consequence retracted, if the marriage afterwards takes place without a fresh consent, equity will not relieve against the forfeiture, where the condition is subsequent, and a devise over. Ib. If a portion be given in consideration that a daughter should never marry, such general restraint is clearly invalid, being repugnant to the very law of the creation. Swinb. 6th edit. 282. And as all conditions in restraint of marriage, are considered with some jealousy by the courts, a strict performance has sometimes been dispensed with: as where only the major part of the guardians have consented, 1 Atk. 375. or, where only a tacit or implied consent has been given, 2 Vern. 580. Where the condition has been general, it has been construed with a limitation to the period of minority, 2 P. Wms. 547. Where the consent has been once given, a second marriage has been held good, without consent, 3 Bro. C. C. 128. And even where the party has married once, between the will, and testator's death, the restriction has been adjudged not applicable to a second marriage, 3 Vez. Jun. 227. Where there was a proviso not to marry without the consent of certain persons first had in writing, and consent was

No. 1. or desiring to be discharged, or refusing, or declining to act, or becoming incapable of acting as aforesaid: and that when, and so often, as any new trustee, or trustees, shall be nominated, or appointed, as aforesaid, all the trust-estates, and premises, which shall then be vested in the trustee or trustees so dying, or desiring to be discharged, or refusing or declining to act, or becoming incapable of acting as aforesaid, either solely or jointly with the other trustee or trustees, shall be thereupon with all convenient speed conveyed, assigned, and transferred in such sort and manner, and so as that the same shall and may be legally and effectually vested in the surviving or continuing trustee or trustees of the same trust estates and premises respectively; and such new or other trustee or trustees, or if there shall be no continuing trustee or trustees of the same trust estates, and premises, then in such new trustee only, upon the same trusts as are hereinbefore declared or expressed, of or concerning the same trust estates and premises respectively, the trustee or trustees whereof shall so die, or be desirous of being discharged, or refuse or decline to act, or be incapable of acting as aforesaid, or such of them as shall be then subsisting or capable of taking effect. And my further will is, that all and every such new trustee or trustees shall or may in all things act and assist in the management, carrying on, and executing of the trusts to which he or they shall be so appointed, in conjunction with the other then surviving or continuing trustees or trustee of the same trust estates, and premises, if there shall be any such continuing trustees or trustee, and if not, then by himself or themselves respectively, as fully and

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given, but not in writing, it was said by Serjeant Ellis, in the case of *Foy et Ux. v. Pester*, 1 Mod. 306, in addressing the court to have been ruled good by them upon another occasion, and such ruling was recognised by Lord Chief Baron Hale, who observed, that there was great equity in it, because such restraint was only a provident circumstance for obliging the party to obtain consent by a more solemn communication, and to ascertain the fact of its having been granted; and therefore it was rather circumstance than substance.

effectually, and with all the same power and powers, authority and authorities, of consent, approbation, discretion, selling, conveying, calling in, laying out and investing, giving and signing receipts, indemnifications, and discharges, to purchasers and others, and all other powers and authorities whatsoever, as if he or they had been originally in and by this my will nominated a trustee, or the trustees for the purposes for which such new trustee or trustees respectively shall be appointed trustee or trustees, or as the trustee or trustees named in this my will, his or their heirs, executors, administrators, or assigns, in or to whose place such new trustee or trustees shall respectively come or succeed, are or is enabled to do, or could or might have done, under and by virtue of this my will, if then living and continuing to act in the trusts hereby reposed in him or them, any thing hereinbefore contained to the contrary thereof in any wise notwithstanding. 'And my will further is, that the several trustees hereby appointed or to be appointed in pursuance of this my will, or any of the heirs, executors, administrators, or assigns, of them, or any of them, shall not be charged or chargeable with any more of the said trust monies and premises, than they respectively shall actually receive, and that one of them shall not be answerable or accountable for the others or other of them, or for the acts, receipts, neglects, or defaults of the others or other of them, but each one for his own acts, receipts, neglects, or defaults only; nor shall they, either or any of them, be answerable or accountable for any banker, broker, or other person, with whom any of the said trust monies may be deposited for safe custody or otherwise, in the execution of the said trusts, nor for the insufficiency or deficiency of any stocks, funds, or securities, in or upon which any of the said trust monies may be invested, in pursuance of and in conformity to this my will, or for any other misfortune, loss, or damage, which may happen in the execution of the aforesaid trusts, or otherwise in relation thereto, unless the same shall happen by or through their own wilful defaults respectively. And also that they the said several trustees so appointed, or to be appointed, shall and may, by and out of the monies which shall come to their re-

No. 1.

No. 2. spective hands, by virtue of the trusts aforesaid, retain to and reimburse himself and themselves, and allow to his and their co-trustee and co-trustees all costs, charges, and expenses which they or any of them may respectively sustain or expend, or be put unto, in or about the execution of the trusts aforesaid, or in any matter relating thereto. And, lastly, I do hereby revoke all former wills by me at any time heretofore made, and declare this only to be my last will and testament.

No. 2.

A Will disposing principally of real Property in Shares, among Children and Grandchildren. (1)

THIS is the last will and testament of me J. C. of N. in the parish of S. in the county of Middlesex. I give and devise unto J. F. and W. A. and J. C. all my freehold mes-

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Of devises to children, and grandchildren.

(1) Where there is an immediate devise to all the children or grandchildren, or children and grandchildren, by a general description, which vests the property in possession upon the death of the testator, and is, therefore, then distributable, none but those in existence at the time, and answering the description, can take; the fund is then disposed of, and distributed, and consequently the after-born children are excluded. But, if the vesting in possession be postponed, so that no distribution need take place at the death of the testator, then all who answer the description, not only at the death of the testator, but born afterwards, and before the fund is to vest in possession, shall take; the general description includes all; and until the period of distribution arrive, none are excluded, Hughes *v.* Hughes, 3 Bro. C. C. 434. Barrington *v.* Tristram, 6 Vez. Jun. 345. Walker *v.* Shore, 15 Vez. 122. Crone *v.* Odell, 1 Ball *v.* Beatty 483. This rule is the same in grants as in wills. In all

suages, lands, tenements, and hereditaments whatsoever, to hold unto them the said J. F. W. A. and J. C. and their heirs, to the uses, upon the trusts, for the intents and purposes, and under and subject to the powers, provisos, limitations, and declarations hereinafter expressed, limited, and declared, of and concerning the same, that is to say, as to, for and concerning all that my freehold messuage or te- No. 2.

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grants of estates in land there must be a person in existence to take at the time the estate vests by the grant; therefore, in the case of a conveyance to one and his children and their heirs, if he has children at the time, the father and all his children take jointly in fee, but if he has no child the father alone takes; an after born child cannot take because the gift was immediate. So if a *devise* be to a man and his children, if he has children at the time, the expressed intent of the testator can take effect, according to the rule of the common law; but if A. *devise* his land to B. and his children, and B. hath not any issue at the time of the devise, he takes an estate tail; for the intent, which is the guide in the construction of a will, is clear that the children are to have an estate; and as immediate devisees they cannot take, because they are not in rerum naturæ, and by way of remainder they cannot take, for the devisor designed to give an immediate estate; therefore, the word *children* shall in such a case operate as a word of limitation, as if the gift had been to B. and the issue of his body. Wild's case, 6 Rep. 16.

On these general principles the law is settled that where a gift by will is immediate, it must operate accordingly. But where a devise or gift is to one for life, remainder to the children, or where the distribution is postponed to a future time, then the children born during the life, or before the time appointed for distribution, become entitled. Graves *v.* Boyle, 1 Atk. 509. Haughton *v.* Harrison, 2 Atk. 329. Atty General *v.* Crispen, 1 Bro. C. C. 386. Baldwin *v.* Carver, Cowp. 309. Andrews *v.* Partington, 3 Bro. C. C. 401. Pulsford *v.* Hunter, 3. Bro. C. C. 416.

Under a bequest to children, grandchildren are not entitled, except from necessity, as, if the will would be otherwise inoperative: Or, where the testator has clearly shewn by other words that he does not use the word children in the proper sense, but according to a more extensive signification. Radcliffe *v.* Buckley, 10 Vez. Jun. 195. by the Master of the Rolls, Sir W. Grant. Crone *v.* Odell, 1 Ball *v.* Beatty, 449.

No. 2.

Devise of testator's freehold messuages, &c. to trustees.

nement in which I now reside, with the chaise-house, wood-house, stable, and garden thereunto belonging, and also all that my freehold messuage or tenement, being No. 5, in N. street aforesaid, with the garden behind the same, now in the tenure of ———, and also all that my freehold messuage or tenement, being No. 4, in N. street aforesaid, with the garden thereunto belonging, now in the tenure of ——— together with all the fixtures and appurtenances to the said messuage or tenement and premises, or any of them, belonging, to the use of the said trustees, their heirs, and assigns, during the natural life of my wife Sarah, upon trust from time to time, during the continuance of that estate, to cause the same premises to be kept in good substantial repair, and to be kept insured from loss or damage by fire, to the full value thereof, or as near thereto as may be, so as that in case any such loss or damage shall happen, the money to be received upon or by means of such insurance, may be laid out in reinstating the same, and to retain or apply so much of the yearly rents, issues, and profits of the same premises as shall be necessary for the respective purposes aforesaid; and subject and without prejudice to the trusts hereinbefore declared, upon trust to pay unto or empower my said wife to receive the rents, issues, and profits of the same premises, or so much thereof as shall remain unapplied for the purpose aforesaid, to and for her own use and benefit; and from and immediately after the decease of my said wife, to the use of my four children, William, Henry, James, and Elizabeth, as tenants in common, and the several heirs of their respective bodies, and in case there shall be a failure of issue of any of such children, then as to the share or shares of him, her, or them, whose issue shall so fail, to the use of the others of them, as tenants in common, and the several heirs of their respective bodies, and in case there shall be a failure of issue of the bodies of all such children but one, then to the use of such one child, and the heirs of his or her body, and in default of such issue, to the use of my own right heirs for ever. And as to for and concerning all those my three freehold messuages or tenements, numbered 1, 2, 3, situate in N. street aforesaid, and now in the several occupations of ———, with the gardens and appurtenances thereunto respectively

To keep the same in repair, and insured from fire.

Limitation creating a tenancy in common, in tail, with cross remainders.

belonging, to the use of the said trustees, their heirs, and assigns, during the natural life of my said son William, upon trust, to support and preserve the contingent remainders hereinafter limited, from being defeated or destroyed, and upon further trust from time to time, during the continuance of that estate to cause the said premises to be kept in good and substantial repair, and to be kept insured from loss or damage by fire, to the full value thereof, or as near thereunto as may be, so as that in case any such loss or damage shall happen, the money to be received upon or by means of such insurance, may be laid out in reinstating the same, and to retain or apply so much of the yearly rents, issues, and profits of the said premises as shall be necessary for the respective purposes aforesaid; and subject and without prejudice to the trusts hereinbefore declared, to pay the rents, issues, and profits of the same premises, or so much thereof as shall remain unapplied for the purposes aforesaid, for the use and benefit of my said son William, during his natural life, and from and immediately after the decease of my said son William, to the use of all and every the child and children,—[Same clause as before for creating a tenancy in common in tail, with cross remainders]—and in default of such issue, to the use of my said sons Henry and James, and daughter Elizabeth, as tenants in common, and the several heirs of their respective bodies,—[Same clause as before, making a tenancy in common, in tail, with cross remainders]—and in default of such issue, to the use of my own right heirs for ever. And as to, for, and concerning all those my seven freehold messuages or tenements, numbered 1, 2, 3, 4, 5, 6, and 7, situate in ——, with the out-houses, gardens, and appurtenances thereunto respectively belonging, as the same are now in the several occupations of ——, to the use of ——— and ———, their heirs and assigns, during the natural life of my said son Henry, upon trust to support and preserve the contingent remainders hereinafter limited from being defeated or destroyed, and upon further trust from time to time (same clause for keeping premises in repair and insuring from fire, &c.) and subject and without prejudice to the trusts hereinbefore declared upon trusts to pay such rents, issues, and profits of the last mentioned premises, or so much

No. 2.

No. 2.

thereof as shall remain undisposed of for the purposes aforesaid, into the proper hands of my said son Henry, for his personal support and maintenance, for which his receipts in writing, signed with his proper hand shall alone be a sufficient discharge. Provided, and my will is, that in case my said son Henry shall alien, or charge, or attempt to alien or charge such his beneficial interest, in such rents, issues, and profits, as aforesaid, or any part thereof, then and from thenceforth he shall cease to have any benefit thereout, and such rents, issues, and profits, as he my son Henry would otherwise have been entitled to, shall for the then residue of his life, go and be paid unto the person or persons who for the time being shall be intitled to the remaind r or reversion of the same hereditaments and premises, expectant on the determination of the said estate so limited to the use of the said trustees, their heirs, and assigns, during the life of my said son Henry, as aforesaid; and from and immediately after the decease of my said son Henry, to the use of all and every the child and children of the body of my son Henry, lawfully to be begotten, as tenants in common—[as before with cross remainders]—and in default of such issue, to the use of my said sons William and James, and daughter Elizabeth, as tenants in common,—[as before]—and in default of such issue, to the use of my own right heirs for ever. And as to, for, and concerning all those my 8 freehold messuages or tenements, numbered 1, 2, 3, 4, 5, 6, 7, 8, situated, &c. with the appurtenances thereto respectively belonging, and now or late in the several occupations of, &c. to the use of the said trustees, their heirs and assigns, during the natural life of my said daughter Elizabeth, upon trust to support and preserve, &c. and upon further trust (to keep premises in repair and insured from fire, as before) and subject, and without prejudice to the trusts hereinbefore declared upon trust to apply such rents, issues, and profits of the said premises, or so much thereof as shall remain undisposed of for the purposes aforesaid, into the proper hands of my said daughter, for her sole and separate use and benefit, exclusively of any husband with whom she may intermarry, and so as the same may not be subject or liable to the power, controul, debts, or engagements of any such husband, and her receipt alone to be a

Proviso against charging or incumbering.

Clause giving the exclusive enjoyment to a married daughter.

No. 2.

sufficient discharge for the same, notwithstanding any coverture she may be under. And in case my said daughter shall at the time of my death be in her minority, and unmarried, then to apply the same for or towards her maintenance and education, or if my said wife shall be living, to pay the same over to her my said wife, in order that she may apply the same for that purpose, and from and immediately after the decease of my said daughter, to the use of all and every the child and children of the body of my said daughter, lawfully to be begotten, as tenants in common—[limitation to her children as before, remainder over on failure of issue to testator's sons in the same manner as before]—provided always, and my will is that it shall and may be lawful to and for the said trustees, and the survivors and survivor of them, and the executors or administrators of such survivor, by indenture or indentures under their or his hands and seals, or hand and seal, respectively to demise or lease such part or parts of the said vacant ground as may not be built upon at my death, unto any person or persons who may be willing to build upon the same or any part or parts thereof, for any term or number of years not exceeding 61 years from the making thereof respectively, yet so as that no erection or building shall be erected, whereby the said street, called St. James's Street, shall be rendered of less width in any part than 30 feet; and to demise or lease all or any of the residue of the hereditaments hereinbefore devised, unto any person or persons, for any term or number of years not exceeding 21 years from the time of the making thereof, so as on every such lease so to be made, whether for building or not, there be reserved and made payable the best and most improved yearly rent or rents that can be reasonably had or gotten for the hereditaments and premises thereby demised, to be incident to and go along with the immediate remainder or reversion of the said premises, without taking any fine, premium, or foregift, for the making or granting of any such lease or leases respectively, and so as that in every such lease there be contained a clause of re-entry for non-payment of the rent or rents thereby reserved, and so as that no lessee or lessees be by any such lease or leases authorised or empowered to commit waste, or exempted from punishment for

Power to make building-leases and common leases.

No. 2. committing the same, and so as the lessee, or respective lessees to whom any such lease or leases shall be so made, shall and do execute a counter-part or counter-parts thereof respectively, and enter into a covenant for payment of the rent or rents so to be reserved. And as to, for, and concerning all those my freehold messuages or tenements, situated in ———, and all those my freehold messuages, situate in ———, and all other my hereditaments hereinbefore devised to the said (trustees) and their heirs, whereof no use is hereinbefore limited or declared, with their appurtenances, to the use of them, the said trustees, their heirs and assigns, for ever, but nevertheless upon the trusts hereinafter declared concerning the same: and I give and bequeath my leasehold messuage and tenement, situated behind the three last mentioned messuages, and also my leasehold messuages and tenement, situate in ———, with their respective appurtenances, unto the said trustees, their executors, administrators, and assigns, for all such terms or term of years, as I shall have therein at the time of my decease, but nevertheless upon the trusts hereinafter declared concerning the same. And as to, for, and concerning as well the freehold messuages, tenements, and hereditaments hereinbefore lastly mentioned, or referred to, as the said leasehold messuages, tenements, and premises, I will and declare that the trustees or trustee thereof respectively, for the time being, do and shall, so soon as conveniently may be after my decease, sell, and absolutely dispose of the same, together or in parts, by public auction or private contract, as to them or him shall seem expedient, for the best price or prices that can be reasonably procured for the same; and as to the money arising by and from such sale or sales, and also as to the clear yearly rents, issues, and profits, arising from the said freehold and leasehold premises so hereinbefore directed to be sold as aforesaid, in the mean time, until the same shall be sold, I will and declare that the same respectively shall be deemed to be part of my personal estate and go according to the dispositions thereof hereinafter contained; and I direct that the receipts of the said trustees, their heirs, executors, administrators, or assigns, for the money arising by any such sale or sales, shall be good discharges for the same, or so much

Direction to trustees to sell freehold and leasehold property and to convert all into personalty, to pay thereout funeral and testamentary charges, and premiums of insurance; to finish certain houses not completed, and to lay out the surplus in the

No. 2.

funds, to accumulate till the youngest son arrives at 21, and then to divide it among the children.

thereof as shall be therein expressed to be received; and that the purchaser or purchasers of the same several hereditaments and premises, or any part thereof, his, her, or their heirs, administrators, or assigns shall not be answerable for any loss, misapplication, or non-application thereof. And as to all my goods, chattels, and personal estate, not by this my will specifically disposed of, I give the same unto the said trustees, upon trust, in the first place to pay thereout all my just debts, (including all such ground-rents and premiums of insurance as may be owing from me at the time of my death,) and my funeral and testamentary charges; and in the next place, the pecuniary legacies given by this my will; and after making all such payments, to lay out so much of the residue as may be necessary in finishing any messuages or other buildings which may happen to be building by me on the said vacant ground, at the time of my death; and to lay out the surplus, if any, in the purchase of 3 per cent. consolidated bank annuities, in the names of them the said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor; and as to such bank annuities, I will and direct that they the said trustees or trustee thereof, for the time being, do and shall place out the dividends or interest arising thereupon, from time to time, until my said son James shall attain the age of 21 years, (or in case he shall die before that age, until the period shall arrive when he would, if living, have attained that age,) in the purchase of like annuities, so as to cause as great an accumulation of stock as may be; and when and so soon as my said son James shall attain the said age, or the period shall arrive when he would, if living, have attained that age, then to transfer one fourth part of such bank annuities as shall have been so purchased as aforesaid, unto my said son William, his executors, or administrators; one other fourth part unto my said son Henry, his executors, or administrators; one other fourth part unto my said daughter Elizabeth, her executors, or administrators; and the remaining fourth part unto my said son James, his executors, or administrators; and I give and bequeath to my said wife all my household goods and furniture, plate, rings, watches, china, ornaments, linen, and wearing apparel, books on the subject of divinity, prints, and

No. 2. such of my drawings as are in frames. And I do hereby will and declare that such stock in the public funds as may at my death be standing in the joint names of my said wife and myself shall be hers absolutely. I give and bequeath to my son Henry all my books, manuscripts, papers, and drawings, (except those given to my wife, and such books as contain matters relating to my business unfinished, and my books of account, and books relative to my estates, all which I direct shall be retained by my executors). I also give to my son Henry all my boxes, containing books and papers relative to measuring, with their contents, utensils, and implements used in my business. I will that my executors do pay out of my personal estate 200*l*. for the board and education of my nephew H. T. until he shall be fit to be put out apprentice, and then that they do pay the further sum of 200*l*. with him as an apprentice fee (2). I give to my son William 20*l*. to be laid out for him as my executors hereafter named shall think proper. I forgive my son-in-law W. T. the debt of 100*l*. which he owes to me, and direct my executors to deliver up to him the bond whereby the same is secured to me, to be cancelled (3). I do hereby nominate, constitute, and appoint the said J. A. W. A. and J. C. executors of this my last will and testament; and I give to them the sum of 50*l*. each, as some compensation for their care and trouble in the execution of the trusts hereby in them reposed, and direct

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(2) If a legacy be given for the benefit of an infant in one way, and it cannot be applied in that way, it may be applied for his benefit in another way, as if it be to put him into orders, and he becomes a lunatic;—and where a legacy is given as an apprentice fee, if the boy is not put out apprentice, he will be entitled to this legacy when he comes of age. 5 Vez. Jun. 461. Barton *v.* Cooke.

(3) If W. T. should die in the testator's life-time this legacy will not lapse. 1 Vez. Jun. 49, 1 P. Wms. 83. But it is to be observed, that such a legacy will not prevail in equity against creditors; it is good, however, against executors, and if an action be brought for it by executors the court will grant an injunction. 3 Atk. 581: 1 P. Wms. 86. (n. 2.)

the same to be paid to, or retained by them, as soon as conveniently may be after my decease. I give and bequeath to my brother and to my two sisters and to my wife's son —— —— the sum of 20*l.* each, to be paid to them respectively, as soon as conveniently may be after my decease. And I appoint my said wife guardian of such of my children as shall be under the age of 21 years at my decease; and after her decease I appoint my said trustees and the survivors or survivor of them the guardians or guardian of such of my children as may be then minors until they respectively shall arrive at the age of 21 years, and I do direct—[clause indemnifying the trustees, &c.]

No. 3.

Appoints his wife guardian.

In witness. &c.

No. 3.

A will disposing of real and personal Estate by way of Provision for Children.

THIS is the last will and testament of me, S. K. of —— ——, &c. I desire to be buried in the vault which I have lately made in the parish church of ———, in the said county, and I earnestly request that my wife and son and all those who for the time being shall be entitled to the rents and profits of my messuages, lands, tenements, and hereditaments hereinafter devised, will pay due attention to the keeping up of those graves and grave-stones of my family, which are in the church-yard of F. in the said county, and to which grave-stones I have lately put head and foot stones. I give and bequeath unto my dear wife, and to my only son S. K. and to my son in law M. R. and to my only daughter R. M. D. his wife, the sum of ——*l.* a piece for mourning; and for the like purpose I give unto C. my son's wife, the

Directions for burial.

No. 3. sum of ——*l.* and to her two sons, U. S. W. and I. S. W. ——*l.* a piece, and to my niece A. L. the sum of ——*l.*; I also give and bequeath unto my said wife all the ornaments of her person, and all my jewels, plate, linen, china, and all my household goods and furniture whatever and wheresoever, and all my books, and all my horses and other cattle, and my chaise, carts, carriages, and implements of husbandry, and also all my stock of wines and other liquors whatever, to hold to her as her own absolute property; I also give to my said wife the use and enjoyment of all my pictures, prints, and drawings, during her life, and from and after her decease I give to my daughter R. M. D. the picture of herself; but the rest of my pictures, and all my prints and drawings, I give to my said son S. K. I give and bequeath to I. N. of T. in the said county, esquire, and to C. B. the younger, of W. in the said county, esquire, the sum of ——*l.* a piece, to be laid out in the purchase of some small piece of plate, to be kept by them respectively as a memorial of the friendship subsisting between us. I order and direct the sum of —*l.* to be divided as my wife shall think proper, or in case of her death as my said son shall think proper, among such of the poor persons resident in or belonging to the parish of St. L. in I———— aforesaid, where I live, as shall happen to be upon my Christmas list, and to have received a small donation by my order at the Christmas preceding my death. I likewise order and direct the sum of ——*l.* to be divided or given as my wife shall think proper, to or amongst any poor family or families of the aforesaid parishes of ——— and ———— which shall seem to her to be most deserving of such reward or assistance: and the rest, residue, and remainder of my personal estate not hereinbefore specifically bequeathed, after payment of my debts, legacies, funeral, and testamentary charges, I give and bequeath to the said G. H. and C. B. their executors, administrators, and assigns, upon and for such and the like trusts, intents, and purposes as are hereinafter mentioned and declared respecting the rents, issues, and profits of the hereditaments hereinafter given and devised to them for the term of 500 years, during the continuance thereof. I nominate and appoint my said wife M. K. sole executrix of this my last will and testament,

Charitable bequests.

No. 3.

thinking it may be more readily executed by one person than by two, yet I earnestly request and hope that my said son will to the utmost of his power aid and assist his mother in the due execution thereof. And as to, for, and concerning my messuages, farms, lands, tenements, and hereditaments next hereinafter mentioned, (that is to say) ———— I give, devise, and confirm the same, with their respective appurtenances, unto and to the use of my said wife for and during the term of her natural life; and from and after her decease unto and to the use of my said son S. K. his heirs and assigns, for ever: And as to, for, and concerning my messuage or tenement, farm, lands, and hereditaments in C—— aforesaid, now in the occupation of ———, I give and devise the same, with their respective appurtenances, unto and to the use of my said wife for and during the term of her natural life; and immediately from and after her decease then as to, for, and concerning the same premises, and from and immediately after my own decease as to, for, and concerning the following estates, (that is to say) my freehold messuages, &c. [various parcels and descriptions of freehold property] I give and devise the same, with their respective appurtenances, unto and to the use of them the said G. N. and C. B. their executors, administrators, and assigns, for and during the term of 500 years, to be computed from the day of my decease, and from thence next ensuing, and fully to be complete and ended without impeachment of waste; but nevertheless upon and for the trusts, intents, and purposes hereinafter expressed and declared concerning the same term; and (subject as aforesaid) from and immediately after the determination of the said term of 500 years, and in the mean time subject thereunto and to the trusts thereof, unto and to the use of the said S. K. and his assigns, for and during the term of his natural life without impeachment of waste, and from and after his decease [to the children of the said S. K. the son in strict settlement, remainder to the testator's right heirs]. And as to, for, and concerning the said term of 500 years hereinbefore limited to the said G. N. and C. B. their executors, administrators, and assigns as aforesaid, I will and declare that the said G. N. and C. B. their executors, administrators, and assigns, do and shall stand

A term of 500 years created.

Trusts of the term declared.

No. 3. and be possessed of the messuages, lands, and hereditaments comprised therein, upon the trusts following, (that is to say) upon trust that they the said trustees, or trustee for the time being, do and shall with and out of the respective rents, issues, and profits of the said hereditaments and premises therein comprised, or by mortgage or sale of a competent part of the same premises for all or any part of the said term, or by both of those means (1), raise and levy such sum and sums of money as shall be necessary for paying so much of my debts, legacies, funeral, and testamentary charges as my personal estate, not specifically bequeathed, may happen to fall short in payment of, and do and shall apply such money so to be raised in discharge thereof accordingly, and subject thereto, upon trust that they the said trustees, or trustee for the time being, do and shall by both or either of the aforesaid means raise, levy, and pay the following clear annual sum of money during the life of my said daughter S. D. (that is to say) the annual sum of ——*l.* (if my wife shall survive me) as long as my said daughter and my said wife shall both be living, and in case my said daughter shall survive my said wife, then the annual sum of ——*l.* during the residue of the life of my said daughter, but if my said wife shall die in my life-time, then the said annual sum of ——*l.* to commence from the time of my death; the said annual sum of ——*l.* or ——*l.* as the case shall happen as aforesaid, to be paid by equal half-yearly payments, on the 24th day of June and 26th day of December in every year, clear of taxes, and without deduction, the first payment of the said annual sum of ——*l.* to be paid on such of the said days as shall first happen next after my decease, in case my said wife shall be living at such day of payment, and the first payment of the said annual sum of ——*l.* to be made on such of the said days as shall first

To make up the deficiency of the personal estate in paying funeral and testamentary charges, and debts and legacies.

And subject thereto to pay an annual sum to his daughter, to be increased after the death of the testator's widow, and to be paid to her separate use.

(1) These last words seem to be proper, since without such words, or the addition of the plural words "sales and mortgages," it might be doubted whether the trustees having raised the money by mortgage could afterwards sell to pay off that mortgage, however beneficial such an arrangement might be; see 12 Ves. Jun. 48.

No. 3.

happen next after the decease of the survivor of me and my said wife; and upon trust that they the said trustees, or trustee for the time being, do and shall pay such of the said annual sums of ——*l.* and ——*l.* as shall be subsisting or ought to be raised as aforesaid, unto such person or persons only, and for such intents and purposes only as my said daughter, by any writing or writings under her hand, shall direct or appoint, notwithstanding her present or any future coverture, and for want of such direction or appointment then do and shall, [for the separate use of the daughter, vide ante, page 252,] and in case my said daughter shall have one or more child or children then upon trust that they the said G. N. and C. B. their executors, administrators, and assigns, do and shall, after the decease of my said daughter, but not before, and when and as any such child or children shall attain their respective age and ages of 21 years, (if my said daughter shall then be dead,) by both or either of the aforesaid means (but subject and without prejudice to the trusts hereinbefore declared concerning the same term) raise and levy such sum or sums of money, for the portion or portions of such child or children, as is or are hereinafter mentioned, (that is to say) if there shall be only one child of my said daughter, who shall attain the said age of 21 years, then the sum of —*l.* for the portion of such one child: If there shall be two such children, and no more, who shall live to attain that age, then the sum of —*l.* for the portions of such two children, the sum to be equally divided among them; and if there shall be three or more such children, who shall live to attain that age, then the sum of —*l.* for the portions of such three or more of them, the same to be equally divided between or among them; such portion or portions as is or are hereby provided for such child or children, to become a vested interest, or vested interests, in him, her, or them respectively, as and when he, she, or they respectively shall attain the age of twenty-one years, after the decease of my said daughter, to be paid at the end of six calendar months next after their attaining such age and ages, with interest for such six months, at the rate of —*l.* per cent. per annum. But as to such of them as shall attain that age in the life-time of my said daughter, the payment of their por-

And after the death of the daughter to raise portions for her children, to vary with the number and to become vested as they attain their ages.

No. 3.

tions shall be postponed until the end of six calendar months, next after her decease, and to be paid with like interest for such six last-mentioned months: and upon this further trust, that the said G. N., and C. B., their executors, administrators, or assigns, do and shall, by both or either of the aforesaid means, raise, levy, and pay, such annual sum or sums of money, for or towards the maintenance and education of such child, or children, of my said daughter, as shall be under the age of twenty-one years, at her decease, as shall be equal to the interest of his, her, or their expectant portion, or respective portions, at the rate of ——— per cent. per annum, until the same shall respectively become vested as aforesaid. And upon this further trust, that if my said daughter shall not have a child, or having any such child or children, they shall all die under the age of twenty-one years, so as not to become entitled to receive the portion and portions hereinbefore provided for them as aforesaid, then upon trust, that the said trustees, or trustee, for the time being, do and shall, by both or either of the aforesaid means, (but subject, and without prejudice, as aforesaid,) raise and levy such sum or sums of money, not exceeding in the whole, the sum of ——*l.* of lawful money of Great Britain, as my said daughter by any deed or deeds, writing or writings, with or without power of revocation, under her hand and seal, attested by two or more credible witnesses, or by her last will and testament, or by any writing in the nature of her last will and testament, to be signed and published in the presence of, and attested by three or more such witnesses, shall, notwithstanding her present, or any future coverture, think fit to direct and appoint, and do and shall pay such sum or sums, if any, as shall be so directed to be raised, not exceeding the said sum of —*l.* as aforesaid, unto or amongst such one or more of the present, or any other son or sons, daughter or daughters, of my said son, S. K., at such time or times, and in such share and shares, manner and form, as my said daughter shall by the same, or any other deed, writing or writings, under her hand and seal, with or without power of revocation, so attested as aforesaid, or by such last will and testament, or writing in nature thereof, as aforesaid, direct or appoint. And in order to facilitate any

Margin notes:

And in the mean time, to raise by way of maintenance for each, an annual sum equivalent to the interest of their respective portions.

And if no child to take such benefit, then to raise a gross sum to be disposed of among specified persons, according to the daughter's appointment.

Receipts of trustees

No. 3.

mortgage, or sale of mortgages, or sales of the same messuages, farms, lands, tenements, and hereditaments, or any part or parts of them, for any of the trusts and purposes aforesaid, I hereby declare, that the receipt or receipts of the said trustees, or trustee, for the time being, shall be a sufficient discharge, or sufficient discharges, to the mortgagee or mortgagees, purchaser or purchasers, of any of the same messuages, farms, lands, tenements, and hereditaments, or of any part or parts thereof, for his, her, or their mortgage, or consideration-money, or for so much thereof as in such receipt, or receipts, shall be expressed to be received, and that such mortgagee or mortgagees, purchaser or purchasers, his, her, or their executors, administrators, or assigns, shall not afterwards be accountable for any misapplication, or non-application thereof, neither shall he, she, or they respectively be concerned to enquire into the necessity of making any such mortgage, or sale, for any of the purposes aforesaid.

to be discharges, and the mortgagees and purchasers not to be answerable for the application of the mortgage or purchase monies.

Provided, and my will further is, that it shall be lawful for the said trustees, or trustee, for the time being, (with the consent of my said son, signified in writing, under his hand, if living, and if not, then at the discretion of them, or him, my said trustees, or trustee,) to apply so much of the rents, issues, and profits of the premises comprised in the term, as to them or him shall seem expedient, in or for the purposes of repairing, or rebuilding any of the messuages or buildings upon the said farms and lands, or improving the same, or any of them, and also to fell, cut down, and dispose of any of the timber, or trees, growing, or being thereupon, for all or any of the last-mentioned purposes;

Trustees empowered with consent of the son to apply necessary sums out of the rents and profits in repairing and rebuilding.

and, subject to the trusts, interests, and purposes, hereinbefore declared, of and concerning the messuages, farms, lands, tenements, and hereditaments, comprised in the said term of 500 years, I declare my will and mind to be, that the said trustees, or trustee, for the time being, do and shall, during the first 21 years of the said term of 500 years, to be computed from the 5th day of April, or 10th day of October, next preceding my death, lay out, and invest, (with the consent of my said son, if living, in writing, under his hand, and if not, then at the discretion of such trustees, or trustee), the residue and clear

And subject to the trusts above-mentioned, to invest the surplus rents, and profits, in the funds, during the first 21 years of the term, after testator's death.

No. 3. surplus of the yearly rents, issues, and profits of the said premises, remaining after paying such the said annual sums of ——*l.* or ——*l.* for the separate use of my said daughter, and such annual sum as shall, for the time being, be applicable for such maintenance as aforesaid, and the interest of any such portion, or portions, hereinbefore directed to be raised, as shall be carrying interest, and also of any such mortgage, or mortgages, as may be made in pursuance of the trusts hereinbefore declared, and after application of such sum or sums of money, as it may be thought proper to dispose of, for such rebuilding, repairing, or improving, as aforesaid, in the public stocks, or funds of Great Britain, or in or upon securities of that government, or real securities in England, at interest, and in like manner, from time to time, to invest the dividends, interest, or annual proceeds of such stocks, funds, or securities, so as within that period to produce as great an accumulation of capital, as reasonably may be, in the nature of compound interest. Provided, nevertheless, and I declare my mind and will to be, that such investments shall cease at the end of 10 or 15 years of the said term of 21 years, if my said son shall in his life-time so direct the same, by any writing under his hand, to be attested by two or more credible witnesses, and then I will and direct, that the said trustees, or trustee, for the time being, do and shall stand possessed of, and interested in such stocks, funds, or securities, as shall have been so from time to time purchased, upon the trusts hereinafter declared concerning the same.

Proviso for the ceasing of the term.

Provided, that when, and so soon as all and every the trusts hereinbefore declared concerning the said term of 500 years, shall in all things have been fully performed, satisfied, or discharged, or shall have become incapable of being carried into execution, and they, the said G. N., and C. B., and each of them, and the executors, administrators, and assigns, of them, and each of them, shall be fully reimbursed and satisfied, all costs, charges, and expences, occasioned by or relating to the trusts of the said term of 500 years, then the same term, or so much as shall remain undisposed of, for the purposes aforesaid, shall cease, determine, and be absolutely void to all intents and purposes

No. 3.

whatever, (any thing herein, &c.) Provided also, and I hereby declare, that it shall and may be lawful to and for my said son, S. K., from time to time, and at all times during his natural life, and after his decease, to and for the person or persons, who, for the time being, shall, under, and by virtue of the limitation hereinbefore contained, be entitled to the hereditaments comprised in the said term of 500 years, either in possession, or in remainder, after the determination of the same term, if he, she, or they shall have attained the age of 21 years, and if not, then for his, her, or their guardian or guardians, (power to lease, see before, p. 253), And as to, for, and concerning all my copyhold messuages, farms, lands, tenements, and hereditaments, with their respective appurtenances, not hereinbefore disposed of for the benefit of my said wife, during her life, with remainder for the benefit of my said son and his heirs, I give and devise the same unto, and to the use of the said S. K., my son, his heirs, and assigns, for ever; yet nevertheless upon such trusts, intents, and purposes, as will correspond with the uses, trusts, interests, and purposes hereinbefore expressed, and declared, of and concerning my said freehold messuages, farms, lands, tenements, and hereditaments, comprised in the term of 500 years, either in possession, or in remainder, after the decease of my said wife, and with which estates such copyhold premises are respectively held and enjoyed, and under, and subject to such and the same powers, provisos, and declarations, or as near thereto as may be, and the different nature of the tenure, and the rules of law and equity will admit of. And as touching such stocks, funds, and securities as shall have been so purchased as aforesaid, I will and declare that the said trustees thereof, for the time being, do and shall stand possessed of, and interested in, the same, upon the trusts following, that is to say, upon trust, that they or he do and shall pay unto, or empower my said son, (if living,) or his assigns, to receive the dividends or interest thereof, during his natural life, and from and immediately after his decease, (or in his life-time, if he shall so direct, by any such deed or writing, as hereinafter is mentioned,) do and shall pay or transfer such stocks, funds, or securities, unto such one child,

Trusts of the accumulated stock.

To permit the son to receive the dividends for life, and after his death to go according to his appointment

No. 3.

among his younger children.

or to and amongst such two or more of the children of my said son, (other than and except an eldest, or an only son, for the time being,) at such age or time, and if more than one, at such ages or times, in such shares and proportions, and in such manner and form as my said son, by any deed, &c. shall direct or appoint; and in default of such direction or appointment, then the same shall become vested in such two or more of the children of my said son (other than and besides such eldest or only son,) as shall attain the age of 21 years, in equal shares, but if there shall be no more than one such child, (other than and besides such eldest or only son,) who shall attain such age, then one moiety only thereof shall vest in such child, and the other moiety shall be considered as having vested in my said son, and be paid or transferred accordingly to his executors, administrators, or assigns: and in case there shall be no child of my said son, (other than, &c.) who shall attain the said age, then the whole of such stocks, funds, or securities, shall be considered as having vested in my said son, and be paid or transferred accordingly, to his executors, administrators, or assigns; and as to any dividends or interest which may arise in respect of such last-mentioned portion, or portions, from the decease of my said son, until the vesting thereof, I will and direct that such dividends or interest shall be invested in such stocks, funds, or securities, (to accumulate as before).

No. 4.

A Will, comprising various dispositions of real and personal Estate, partly of testator's own estate, and partly in performance of various trusts and obligations imposed on him by antecedent settlements.

THIS is the last will and testament of me J. N., of Whereas, under, and by virtue of the settlement, made previous to my marriage with Mary, my wife, (then Mary S.) certain hereditaments at W———, (whereof she was seised in fee simple,) stand limited to the use of me for life, with remainder to the use of the trustees therein named, and their heirs, during my life, in trust to preserve the contingent remainders; remainder to the use of my said wife for life; remainder to the use of all and every the child and children of our marriage, in tail, with cross remainders; remainder to such uses as my said wife shall, by such deed or will, as is therein mentioned, appoint, and in default of such appointment, to the use of her right heirs; and by the same settlement, her portion, consisting of the sum of 1500*l*., was agreed to be vested in the trustees therein named, upon trust, after the solemnization of the said marriage, to pay the interest thereof to me during my life, and after my decease, to my said wife, for her life, and after the decease of the survivor of us upon such trusts, as to the principal money, for the benefit of the children of the said marriage, as therein mentioned, and in case there should be no such child or children, or being such, all of them should die before such ages or times as are therein mentioned, upon trust, to apply the said sum of 1500*l*. as my said wife should, by such deed or will, as is therein mentioned, appoint, and in default of such appointment, to her executors, administrators, or assigns; and my father, Richard N., thereby covenanted, that in case the then intended marriage should take effect, and the said Mary should survive me, he, his heirs, executors, or administrators, would yearly pay unto her, during her life, such sum of money, as, with the clear yearly

Recital of provisions and limitations of real and personal property, under settlement by deeds and wills.

No. 4. produce of her said real and personal estate, thereby settled, or agreed to be settled, would make up the clear yearly sum of 200*l.*, and my said father thereby covenanted to pay the sum of 2000*l.* to the said trustees therein named, upon such trusts, for the benefit of the children of the said marriage, as are therein mentioned: and whereas the said portion, or sum of 1500*l.* was received by me, and yet continues in my hands, and there hath not, as yet, been any issue of the said marriage; and whereas my said late father, Richard N., by his last will and testament, in writing, bearing date the —— day of ————, 17—, after confirming the said settlement, and ordering his debts to be paid out of his personal estate, devised his freehold messuages, lands, and tenements at B————, in the county of ————, to the use of a trustee therein named, for the term of 500 years, upon the trusts thereinafter declared, and hereinafter in part mentioned; remainder to the use of me for life, without impeachment of waste; remainder to the use of trustees, and their heirs, during my life, in trust, to preserve the contingent remainders; remainder to the use of my first, and every other son successively, in tail male; remainder to the use of my daughters, as tenants in common, in tail, with cross remainders; remainder to his nephew, William N., for his life; remainder to the use of trustees, and their heirs, during the life of the said William N. in trust, to preserve the contingent remainders; remainder to the use of James N., son of the said William, for his life; remainder to the use of trustees and their heirs, during his life, in trust, to preserve the contingent remainders; remainder to the use of the first, and every other son of the said James N. successively, in tail male; remainder to the use of the male heir, who should be lawfully entitled, for the time being, to the ancient estate, at G. belonging to the N————'s, for the life of such male heir; remainder to the use of trustees, and their heirs, during the life of the said male heir, to preserve the contingent remainders; remainder to the use of the first, and every other son of the said male heir successively, in tail male, reversion to the use of his (my said father's,) right heirs; and he gave to his wife Jane, an annuity of 100*l.* for her life, to be paid out of his real estate, and declared that the said term of

Limitations by way of strict settlement recited.

No. 4.

500 years, was so limited to the use of the trustees thereof, as aforesaid, for securing the payment of the said annuity, and for raising all such sum or sums of money as he should have to pay, in consequence of his covenant in my said marriage, and he gave his leasehold estate to trustees, upon trust, to permit the person, who for the time being, should be in possession of his freehold estates, by virtue of his will, to receive the rents and profits thereof, subject to the payment of the said 100*l.* annuity, and the sum he had engaged to pay, under my said settlement; and he gave all his monies at interest, and securities for the same, and the interest thereof, and 500*l.* stock in the ——— canal, (200*l.* whereof then stood, and is yet standing in my name,) and all profits and dividends belonging to the same, and also all his silver plate, household furniture, beds, bedding, pictures, prints, watches, books, live cattle, husbandry gears, to trustees, upon trust, to pay out of his said monies, his debts, funeral expences, the probate of his will, and in the next place, to pay to me the sum of 500*l.* upon my succeeding to the rectory of G. by three equal payments, in each year, next after my institution, for the purpose of being laid out at my discretion, in the improvement of the glebe lands, and buildings; and as to the remainder of the money, to lay out the same, with the approbation of the person, who, for the time being, should, by virtue of his will, be in the possession of his real estate, in the purchasing of freehold premises, in the county of ———, to be conveyed to the trustees, upon the same trusts as the other real estates, by virtue of his will, were limited to, or such of them as should be capable of taking effect: as to husbandry gear, and quick goods, they were to be sold, and the money arising therefrom to be invested in the purchase of freehold lands, within the county of ———, for the uses limited of his other estates, by his said will; and as to household furniture, beds, bedding, rings, watches, plate, pictures, &c. he gave to his said wife such parts thereof, as he should particularise in a schedule, for her life; and as to such parts thereof as should not be so directed, and those so directed after her death, the trustees were to permit the person for the time being, entitled to his real estate, to have

Dispositions of personalty by his father's will recited.

No. 4. the use thereof; and, until such purchases as aforesaid shall be made, the trustees were to continue the monies at interest, or to call in and replace the same, either on mortgages, or invest the same in the public funds, and pay or permit the person lawfully in possession, for the time being, of his real estates, to receive the interest and dividends of the same; and as to the said 500*l.* canal stock, the trustees were to permit the person or persons, who, for the time being, would be entitled to the premises, to be purchased as aforesaid, or until purchased, the interest of the money intended to purchase the same, to receive the dividends thereof, and afterwards to transfer the principal to such person and persons, his, her, and their executors, administrators, and assigns, in whom the premises so to be purchased, (when purchased), his or their heirs, or assigns, should become absolute at law, by virtue of his will. And he made me (subject, and without prejudice to any of the trusts therein contained,) executor of his said will. And whereas my said father departed this life in the year ———, without revoking or altering his said will, leaving me, his only child, and heir at law; and shortly after his decease, I proved the same will, in the prerogative court of Canterbury. And whereas, exclusively of the specific estates, to the enjoyment whereof I am entitled for my life, under my said father's will, I remain possessed of the said sum of 500*l.* canal stock, and of the sum of 70*l.* like stock, which my said father purchased after the making of his said will, and the residue of my said late father's personal estate has been permitted to remain in my hands; and it will appear by my accounts, as executor of my said father's will, that such residue amounts to the sum of ——*l.* And whereas, the said Jane, my late mother, departed this life in the year ———, having first duly made her last will and testament, whereby she gave to me all arrears which should be due, in respect of her said annuity of 100*l.* at the time of her death, upon my paying to her relation, Mary R———, an annuity of 10*l.* during her life; and gave the use of her watch to me for life, and at my decease, the same, and the rings, pictures, and trinkets, whereof she was possessed, she directed to go to the uses thereof directed by her

Debits himself as his father's executor on account of the residue of his personal estate.

No. 4.

said husband's will: and I having elected to take the benefit of the bequests in her said will, have paid the said annuity of 10*l.* to the said Jane R——, up to the last day of payment thereof, preceding the date of this my will. And whereas, I am desirous, that as well the trust in my said marriage settlement, regarding the said portion or sum of 1500*l.* as those of my said father's will, touching his personal estates, or such and so many thereof as remain to be performed, and also the trusts in my said mother's will, touching the specific chattels therein-mentioned, should be performed and carried into execution, I therefore direct, that ——— and ———, my executors, hereinafter appointed, do and shall, as soon as conveniently may be, after my decease, pay the sum of 1500*l.* in satisfaction of the debt owing from me in respect of my having so received my wife's portion of that amount as aforesaid, with interest for the same, after the rate of 5*l.* for 100*l.* for a year, to the trustees or trustee, for the time being, in my said marriage settlement, upon such of the trusts therein declared, concerning the same respectively, as shall be then subsisting, or capable of taking effect: and I further direct, that my said executors do and shall, so soon as conveniently may be after my decease, transfer the said sum of 500*l.* navigation stock, unto the trustees or trustee, for the time being, who shall be then entitled to receive the same, under my said father's will, upon such and the same trusts therein declared, concerning the same respectively, as shall be then subsisting, or capable of taking effect; and also that they, my said executors, do and shall, so soon as conveniently may be, after my decease, deliver over the specific things, to the enjoyment whereof I am entitled for my life, under the said will of my mother, to the person or persons, who, for the time being, shall be then entitled to receive the same, upon such of the trusts therein contained or referred to, as shall be then subsisting, or capable of being performed, and deliver over such plate, furniture, pictures, rings, watches, and books, as my said late father died possessed of, and that have come to my hands, the books being mentioned in a catalogue made by him, and the plate being distinguished by the armorial bearings of his and my late mother's family, or

That testator is desirous of performing the trusts of his marriage settlement, and his father's and mother's will before mentioned.

Direction to his own trustees and executors, to make good the sum of 1500*l.* which he owes to the trustees of his marriage settlement.

To transfer the 500*l.* navigation stock to the trustees of his father's will.

To transfer the specific things, which, under his mother's will, he was to enjoy for life, to the persons entitled to receive the same after him.

To pay over the sums stated in his (the testator's) account, as his father's executor,

No. 4.

to be the balance owing from him, as such executor, in respect of the residue of his father's personal estate, to the person or persons entitled to receive the same under his father's will.

one of their families; and pay over, to the person or persons entitled to receive the same under my said father's will, the said sum of ——*l.* (which is stated in my said account as executor to be the amount of the balance owing from me, as such, in respect of the clear residue of my said father's personal estate, to be laid out in the purchase of lands, as aforesaid, or such other balance or sum of money as may be found due on the taking of such account. And whereas it will appear from my said account, as executor, that some articles of my said late father's furniture were sold by me, which produced the sum of ——*l.* I direct my executors to make good the same to the said trust estate, either by the delivery of furniture of mine of the like value, or by payment of that sum, to the person or persons entitled for the time being to receive the same under my said father's will. And in as much as I have in my hands, as executor as aforesaid, the sum of 26*l.* for which I have taken credit in my said account as a debt due from my said late father's estate to or in trust for —— charity, the interest whereof has been for many years past applied for the charitable purpose hereinafter mentioned, I therefore direct my executors to discharge that debt by payment of the said sum of 26*l.* to such persons, to be approved by the rector, for the time being, of the parish church of G. aforesaid, as they shall think fit, upon trust to place the same out at interest on government or real securities, with liberty of transposing the same, and to pay the interest or dividends arising therefrom, to the master, for the time being, of the endowed school at G. aforesaid, for educating eleven poor boys in the said school to be nominated from time to time by such rector, or in his absence from the said cure, by the officiating minister, for the time being, of the said church.

To replace some articles of his father's furniture, sold by him.

And to pay over a sum left by his father to a charity.

Additional annuity to testator's wife.

And I give unto my said wife an annuity or yearly sum of 10*l.* of lawful money of Great Britain, during her natural life, in addition to her provision under my said marriage settlement and the trusts of the term of 500 years created by my said father's will, the same to be paid clear of taxes and without deductions, by equal half yearly payments, the first payment thereof to be made at the expiration of six

No. 4.

Furniture to his wife absolutely.

calendar months next after my decease. And I give to my said wife absolutely (1) such of my household furniture and linen (2) as she shall select, not exceeding, in the whole, the value of ——*l.* (such value to be ascertained by the general appraisement which I desire to be made of my furniture) except locks, iron ovens, bells fixed, fixed stoves, and such other things as are or may be fixed or fastened to the mansion house at G. wherein I now reside, my will being that such excepted articles shall go along with the said mansion-house, and be enjoyed by the person or persons for the time being entitled to the possession thereof, as heir-looms, so long as the law will permit. And I give to her my said wife the use and enjoyment of such plate as I have purchased, and whereon are engraven the armorial bearings of her or my family, or one of our families, during her life. And from and immediately after her decease I give the same to George N., second son of the said William N., if he shall be then living, absolutely, and if he shall be then dead, unto Peter N., third son of the said William N., if he shall then be living, absolutely; but if neither of them the said George

Except articles fixed or fastened to the house; which are to go with the house and be enjoyed as heir-looms.

The plate, whereon there are armorial bearings; to the wife for her use, during her life, and after her decease, to two persons named in succession, and if neither should be living at testator's decease to go together with the personal estate.

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(1) Where a testator gives to A. during her natural life, his house at B. with all the goods that shall be found therein at the time of his decease, the word *with* so conjoins the devise of the house and household goods, that the devisee can have no longer interest in the latter than was expressly limited in the former. 1 Atkins, 470, Luke *v.* Bennet. And where a testator gave to his wife all his household goods, furniture, plate, linen and china in his house at E. or to the house belonging, and also the said house, gardens, &c. so long as she continued his widow, and no longer; Lord Hardwicke held that the household goods, furniture, &c. were put under the same restrictions as the house itself. Richards *v.* Baker, 2 Atk. 321. Such a gift will not bar the wife of her paraphernalia. 2 Atk. 216. See also 3 Atk. 369 and 393.

(2) A bequest of the best of my linen, or of some of my best linen, is void for uncertainty; but a bequest of such of my linen as my executor shall think fit, or as I. S. (the legatee) shall chuse, is good; Peck *v.* Halsey, 2 P. Wms. 387.

No. 4. N. or Peter N. shall be then living, then the same to be considered as part of the residue of my personal estate; and my will is that an inventory shall be made of such plate, and that my said wife shall, on receiving the same, be required to sign such inventory, accompanied with an undertaking for the delivery thereof by her representatives, upon or immediately after her decease, to the person or persons who shall be entitled to the same under this my will. I give to S. P. the sum of 100*l.* and to R. S. the like sum of 100*l.* and I desire that each of them may have decent mourning, at the discretion of my executors. I give to my executors the sum of 100*l.* a piece, as an acknowledgment for the trouble that they may have in the execution of this my will. I give to the said James N. the sum of 30*l.* upon trust, to place out the same on government or real securities at interest, in the name of such persons as he, his executors or administrators, shall think proper, with liberty to the trustees or trustee thereof for the time being, of transposing the same, to the intent that such trustees or trustee do apply the interest or dividends arising therefrom, for or towards the education of four poor boys, at or in the said school at G. aforesaid, to be from time to time nominated by such trustees or trustee for the time being. I give the sum of 100*l.* to the treasurer for the time being of the infirmary of ———, in the county of ———, to be applied to the charitable purposes of that institution; and I direct my executors to distribute the sum of ——*l.* among such poor persons attending divine service in the parish church of G. aforesaid, the Sunday next after my death, and in such proportions as they my said executors shall think proper; and I desire that all my servants who shall be in my service at the

His wife to sign an inventory*.

Legacies and mourning.

Remuneration to executors.

Charity legacies.

For educating four poor boys.

To a hospital.

A sum to be distributed as alms.

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* The effect of a direction for an inventory is held of itself to limit the enjoyment to the life only of the legatee, Southey *v.* Lord Somerville, 13 Vez. Jun. 493. And a devisee for life *must* sign an inventory to be deposited by the master, for the benefit of all parties. Leeke *v.* Bennet, 1 Atkins, 471. Bill *v.* Kynaston, 2 Atk. 81.

No. 4.

The residue of the personal estate to be placed out at interest, with power to trustees to vary and transpose securities.

And after keeping down the annuities, to reinvest the dividends for the purpose of accumulation until the principal shall be payable, as after-mentioned. One third to be paid to —, one other third to —, and the remaining third to —, at 21, with chance of survivorship.

time of my decease, may receive a whole year's wages, to be added to the sum or sums then due to them for wages (3). And as to the residue of my personal estate, not otherwise disposed of by this my will, I give the same to my said executors, upon trust, that they, or the survivor of them, or the executors or administrators of such survivor, do and shall place out the same at interest in some of the parliamentary stocks or funds of Great Britain, or on real securities in England at interest, and do and shall from time to time vary, alter, or transpose the same for other stocks or funds, or securities of the like nature, when and so often as it shall seem expedient; and do and shall, after paying and keeping down the said annuity of 10*l*. hereinbefore given to my said wife for her life, and also the said annuity which I am liable to pay to the said Mary R. during her life, in the mean time, until the capital in the respective shares thereof shall become payable or transferable as hereinafter is mentioned, invest the interest or dividends thereof, as and when the same shall amount to 100*l*. in like stocks, funds, or securities, so as to cause the same to accumulate in the nature of compound interest; and do and shall pay or transfer one third part of all such stocks, funds, and securities, but subject and without prejudice to the payment of the said annuities unto the said George N. as and when he shall attain the age of 21 years; one other third part thereof unto the said Peter N. as and when he shall attain the age of 21 years; and the remaining third part unto Maria N. daughter of the said William N. as and when she shall attain her age of 21 years; and in case any one or more of them the said George N. Peter N. and Maria N. shall die without having attained the said age, then the share or shares of him or them so dying, of and in the said stocks, funds or securities, shall go and be paid or transferred, subject and without prejudice as aforesaid, to the survivors or survivor, or others or other of them, as and when their respective original shares shall

(3) Under a general bequest to servants, a coachman provided with a carriage and horses let by the job, is not entitled. Chilcot v. Bromley, 12 Vez. Jun. 114.

No. 4. respectively become payable or transferable as aforesaid; and in case any other of them shall die without having attained the said age, then all and every the accruing share or shares shall be subject and liable to the like contingency of accruer or survivorship as is hereinbefore declared, touching his, her, or their respective original share or shares;

And if neither of the three should live to become entitled, to be transferred to —.

and in case all of them the said George N. Peter N. and Maria N. shall die without any of them having attained the age of 21 years, then my will is that the whole of such stocks, funds or securities shall be transferred, but subject and without prejudice as aforesaid, to ——: And I appoint the said —— executors of this my last will and testament.

Devise of his own messuages and farms not under settlement.

And as to my messuage, farm, and lands, situate at or near W. aforesaid, I give the same unto S. P. and R. S. their heirs and assigns for ever; and as to my messuages, farm and lands, situate in or near to the said settled estate of my family at G. aforesaid, which I purchased of William S. for the sum of 1900*l.* my messuage, farm and lands situate at or near to the said estate at B. aforesaid, which I purchased of James P., my lands in ——, contiguous to the said estate at B., and intermixed therewith, which I purchased of John G., my lands in ——, lying also contiguous to the said estate at B., which I purchased of Hugh H., which several premises so purchased by me are partly freehold, and partly leasehold, and also as to, for, and concerning my messuage, farm and lands, situate at B. in the said county, and all the rest of my freehold and leasehold estates whereof I have power to dispose in possession, reversion, remainder, or expectancy, and not hereinbefore disposed of, (4) I give the same unto and to the use of the said —— and ——, their heirs, executors, administrators and assigns, upon the trusts hereinafter

To trustees:

(4) If a testator, in terms, excepts out of his residuary devise what he has before disposed of, such exception takes out of the residuary devise only the interest before given, not the things themselves; therefore if a life-estate only in any subject has before been given, the residuary devise comprehends and carries the remaining interest; see 3 Atk. 286.

No. 4.

expressed and declared of and concerning the same, that is to say, upon trust, that they and the survivor of them, and the heirs, executors, administrators and assigns of such survivor, do and shall, as soon after my decease as they or he shall think fit, make sale and dispose of all and every my said freehold and leasehold estates, so devised to them as aforesaid, either together or in parcels, by public auction or private contract, as to them or him shall seem meet, for the most money that can be reasonably had or gotten for the same; and I do hereby declare that the receipt and receipts of the said, &c. and the survivor of them, the heirs, executors, administrators or assigns of such survivor, under their or his hands or hand respectively, shall from time to time be a good and effectual discharge, or good and effectual discharges, to the purchaser or purchasers of the same freehold and leasehold estate, or any part thereof, and his, her, or their heirs, executors, administrators and assigns, for his, her, or their purchase-money, or so much thereof as in such receipt or receipts shall be expressed to be received, and that such purchaser or purchasers, his, her, or their executors, administrators or assigns, shall not be answerable or accountable for any loss, misapplication or non-application of such purchase-money, so expressed to be received; and as to the money arising from such sale or sales as aforesaid, (as to which I direct a separate account to be kept,) my will is, that the same shall be in the first place applied in making good the deficiency, if any shall then be, of my personal estate, not specifically bequeathed, in paying my debts, funeral, and testamentary charges and legacies, (save those for charitable purposes) and that the residue of such monies, or the whole thereof, if there shall be no such deficiency, shall be paid to such person or persons, and be applied for such intents and purposes, as the residue of my personal estate is hereinbefore directed to be paid and applied; and as to the rents, issues and profits of the said estates, until sale thereof, I will that the same shall be paid and applied in such manner as the interest of the money arising by sale thereof would be payable or applicable to under this my will, in case such sale had taken place. Provided always, and it is my will, that in case the trustees or trustee

Upon trust to sell or dispose thereof.

Their receipts to be discharged

And as to the money produced by the sales; in the first place to be applied in aid of the personal estate, in paying debts, charges and legacies: and subject to such application in the first place, to be considered as personal, and to go according to the disposition of

No. 4.

the residue of his personal estate.

Proviso, that if his late father's trustees should be willing to accept a conveyance of his estate at B——, at the sum at which the same was purchased by testator, it should be lawful for testator's trustees to make such conveyance, taking a discharge for so much of the balance of his father's residuary estate in his hands as the purchase money for such estate should amount to.

Leasing power to trustees.

for the time being of the residue of my said father's personal estate, shall be willing to accept a conveyance and assignment of my freehold and leasehold estates, in B——, aforesaid, or any of them, or any part thereof at the above-mentioned sum or sums of money, for which I purchased the same, then and in such case it shall be lawful for the trustees or trustee for the time being, under this my will, to make such conveyance and assignment accordingly, on obtaining a sufficient discharge for so much of the said balance on account of the said residuary estate in my hands, as the consideration money of the estate or estates comprised in such conveyance or assignment shall amount to. Provided always, and my will is, that it shall and may be lawful to and for the said, &c. and the survivor of them, and the heirs, executors, administrators, and assigns of such survivor, from time to time, by indenture or indentures under their or his hands and seals, or hand and seal, to demise or lease the said freehold and leasehold hereditaments, and premises, so vested in them as aforesaid, or such of them as shall be remaining unsold or undisposed of, during the minority of the said I. P. and R. S., or either of them, unto any person or persons, for any term or number of years not exceeding 21 years, in possession, not in reversion, or by way of future interest, so as upon every such lease there be reserved and made payable, during the continuance thereof respectively, the best and most improved yearly rent or rents that can be reasonably had for the same, to be incident to the reversion of the premises so to be demised, without taking any sum or sums of money, or other thing by way of fine or premium for the making of any such lease, and so as none of such lessees shall be made dispunishable for waste, and that in every such lease there be contained a clause of re-entry for non-payment of the rent or rents, to be thereby respectively reserved, and that such lessees seal and deliver counterparts of such lease and leases. Provided, and my will further is, [proviso for substituting new trustees with safety, and indemnity clauses.]

No. 5.

Part of a Will directing a Settlement, with Limitations in a strict Form for preserving the Estate in the Family of the Testator.

Testator devises his real estates to the use of two sets of trustees successively, for two several terms of 99 and 200 years.

I GIVE and devise all and singular my freehold manors, messuages, lands, tenements, and hereditaments, wheresoever and whatsoever, not hereinbefore devised, unto the said J. W. and Sir R. J. B., their heirs and assigns, to hold the same to the uses following, that is to say, as to, for and concerning all such of the same hereditaments and premises, as are situate in the parish, township, or precinct of N——, in the county of N———, with their appurtenances, to the use of the said Sir G. C., R. M., and J. D., their executors, and administrators, for, and during, and unto the full end and term of 99 years, to commence and be computed from the time of my decease, without impeachment of waste, upon the trusts, and to and for the intents and purposes, and with, under, and subject to the powers, provisos and declarations hereinafter declared or expressed with respect thereto: and as to, for, and concerning all such of the same hereditaments and premises as are situate in the parishes, townships, or precincts of F. H. and S. and the parishes or townships contiguous and next adjoining thereto, with the appurtenances, except the manor or lordship of F——, and the advowson of the rectory of F——, to the use of the said Sir G. C., R. M., and J. D., J. C. J., and J. F., their executors, and administrators, for and during and unto the full end and term of 200 years, to commence and be computed from the time of my decease, without impeachment of waste, upon the several trusts, and to and for the several intents and purposes, and with, under, and subject to the several powers, provisos, restrictions, and declarations hereinafter expressed with respect thereto; and as to, for, and concerning, as well all and

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And after the determination of the terms, to trustees and their heirs to convey in strict settlement to his son and his issue.

singular the said hereditaments, and premises comprised in the said several terms of 99 years, and 200 years respectively, from and after the end, expiration, or other sooner determination of the said terms respectively, and in the mean time subject thereto respectively, as also all and singular other the hereditaments lastly hereinbefore by me devised, from and immediately after my decease, to the uses of the said J. W. J., and Sir R. J. B., their heirs, and assigns for ever upon the trusts, nevertheless hereinafter mentioned, that is to say, upon trust; and I do hereby direct that they the said J. W., Sir R. J. B., or the survivor of them, or the heirs of such survivor, shall with all convenient speed after my decease, convey and assure all and singular the said manors, messuages, farms, lands, tenements, and hereditaments, subject as to such of the said hereditaments as are comprised in the said several terms of 99 years, and 200 years respectively, to the same terms respectively, and the trusts thereof, to and for the uses, intents, and purposes, upon the trusts, and with, under, and subject to the powers, provisos, conditions, restrictions, and limitations hereinafter expressed concerning the same, that is to say, to the use of my said son W. A., and his assigns, for and during the term of his natural life (1), without impeachment of waste, so far as is con-

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(1) Where the object of the testator is to preserve the devised estates as long as possible in his family, he may devise the fee to trustees and their heirs to the following uses, viz. to the use of his eldest son, for the term of 99 years, to be computed from the day of his, the testator's decease, and fully to be complete and ended, if his said son shall so long live, and from and immediately after the determination of the said term, and in the mean time subject thereto, to the use of the trustees and their heirs, during the life of the said son in trust, in the usual form, to preserve the contingent remainders, and from and after the decease of the said son, to the use of the first and other sons of that son in tail male, to be followed with like limitations successively, in favour of the younger sons of the testator, and their first and other sons respectively, remainder to testator's eldest daughter, for a similar term, if she should so long live, remainder to trustees to preserve contingent uses, and so on, with like limitations successively in favour of the testator'

No. 5.

sistent with the trusts of the same several term of 99 years, and 200 years respectively, while the same shall be respectively subsisting, and from and after the determination of that estate, by forfeiture or otherwise, in the life-time of the said W. A., to the use of trustees in such settlement, to be named, and their heirs, during the life of the said W. A., in trust by the usual ways and means to support and preserve the contingent uses and estates thereby limited, but nevertheless to permit and suffer the said W. A., and his assignees, during his life to receive and take the rents, issues, and profits thereof, for his and their own benefit; and from and after the decease of the said W. A., to the use of the 1st, 2d, 3d, 4th, and all and every other son and sons of the body of the said W. A., lawfully begotten, or to be begotten, severally, successively, and respectively, and in remainder, one after another, as they respectively shall be in seniority of age and priority of birth, and the several respective heirs male of the body and respective bodies of such son and sons, lawfully issuing, so as that every elder of such sons, and the heirs male of his body issuing, shall be always preferred to and take before the younger of such sons, and the heirs male of his and their body and bodies issuing, and for default of such issue, to the use of my said younger son Edward, for and during the term of his natural life, without impeachment of waste, so far as is consistent with the trusts of the same several terms of 99 years, and 200 years respectively, whilst

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younger daughters, with remainder to their first and other sons respectively, in tail male, in the same manner with successive remainders, if testator please, to daughters of sons, and then to daughters of daughters, as tenants in common in tail, with cross remainders.

The consequence of thus giving to the children of the testator terms of years determinable with their lives, instead of estates of freehold, will be, that they will not be able with the concurrence of the tenant in tail in remainder, unless the trustees will join in making a tenant to the præcipe, to suffer a recovery so as to defeat the remainders after such tenant in tail: the tenant in tail can, in such a case, only bar his own issue by a fine.

No. 5. the same shall be respectively subsisting, and from and after the determination of that estate, by forfeiture or otherwise, in the life-time of my said son Edward, to the use of such trustees in such settlement to be named, and their heirs, during the life of my said son Edward, in trust, by the usual ways and means to preserve and support the contingent uses and estates thereby to be limited, but nevertheless to permit and suffer my said son Edward, and his assigns, during his life, to receive and take the rents, issues, and profits thereof, for his and their own use and benefit, and from and after the decease of my said son Edward, to the use of all and every other the 1st, 2d, 3d, and 4th son and sons of the body of my said son Edward, lawfully begotten, severally, successively and respectively, and in remainder, one after another as they respectively shall be in priority of birth and seniority of age, and the several and respective heirs male of the body and respective bodies of such son and sons, lawfully issuing, so as that the elder of such sons, and the heirs male of his body issuing, shall always be preferred to and take before the younger of such sons, and the heirs male of his and their body and bodies issuing; and for default of such issue, to the use of all and every other the son and sons of my body, lawfully begotten, or to be begotten, severally, successively, and respectively, and in remainder, one after another as they respectively shall be in seniority of age, and priority of birth, and the heirs male of the body and respective bodies of such son and sons lawfully issuing, so as that the elder of such sons, and the heirs male of his body shall be always preferred to and take before the younger of such sons, and the heirs male of his and their body and respective bodies issuing; and for default of such issue, to the use of trustees and their heirs, during the lives of my said daughters L. and C., and the life of the survivor of them, in trust to pay the rents, issues, and profits thereof to such person or persons respectively as they my said daughters respectively, during their joint lives, by any writing or writings under their respective hands, shall from time to time as the same respectively shall become due or payable, but not by way of anticipation, direct or appoint, so as that my said daughters, during their joint lives, shall not have a power of disposing of more than

For default of issue of sons, to trustees during the lives of his two daughters, and the survivor of them, for their separate use respectively, with limitations to their re-

No. 5.

a moiety each of the said rents, issues, and profits, and for want of such direction or appointment, into the proper hands of them respectively in moieties, whilst both of them shall be living, for their respective, sole, and separate use, exclusively and independently of any husband or husbands, and not in anywise to be subject to the controul, debts, or engagements of their respective husbands; and from and immediately after the decease of either of my said daughters who shall first happen to die, then in case such daughter so dying shall leave any child or children, her surviving, in trust during the natural life of the survivor of my said daughters, to pay and apply one moiety or equal half part of the rents, issues, and profits of the said premises unto, between, or amongst, or for the benefit and advantage of such child or children, in equal shares and proportions, if more than one, and if there shall be only one such child, then for the benefit and advantage of such one child; and to pay and apply the other moiety of the said rents, issues, and profits to such person or persons as such surviving daughter, by any writing or writings under her hand, shall from time to time as the same shall become due or payable, but not by way of anticipation, direct or appoint, and for want of such direction or appointment, into the proper hands of such surviving daughter, for her sole and separate use exclusively and independently of any husband, and not to be in anywise subject to the controul, debts, or engagements of any husband; but in case such daughter so first dying as aforesaid shall not leave any child or children, her surviving, or leaving any such, all of them shall happen to die during the life of such surviving daughter, then upon trust, from and immediately after the decease or such failure of children of such daughter so first dying as aforesaid, as the case may happen, in trust, to pay and apply the whole of the said rents, issues, and profits to such person or persons as such surviving daughter, by any writing or writings under her hand, shall from time to time, during her life, as the same shall become due or payable, but not by way of anticipation direct or appoint, and for want of such direction or appointment into the proper hands of such surviving daughter, for her sole and separate use exclusively and independently of any husband, and not to be in

spective issue in tail, but such limitations of the inheritance not to take place till both the daughters shall be dead, to prevent alienation till that event, and then the distinct moieties to go in succession to the sons of testator's said daughters in tail male, and for default of such issue respectively, then to the first and other sons of the other daughter reciprocally.

No. 5. anywise subject to the controul, debts, or engagements of any husband; and my will is that the respective receipts in writing of my said daughters, and the receipt of the survivor, notwithstanding any coverture, or the receipt or receipts of the person or persons to whom they respectively, or the survivor of them, shall direct the said rents, issues, and profits to be paid as aforesaid, shall be good and effectual releases and discharges for the rents, issues, and profits therein mentioned to be received; and upon further trust, during the lives of my said daughters, and the life of the survivor of them, to preserve the contingent uses and estates, to be limited as hereinafter mentioned; and from and after the decease of the survivor of them my said daughters, as to one moiety or equal half part or share of the same hereditaments, to the use of the first and other sons of my said daughter L. successively, according to their respective seniorities in tail male, and for default of such issue, to the use of the first and other sons of my said daughter C. successively, according to their respective seniorities in tail male; and as to the other undivided moiety or equal half part or share of the same hereditaments, to the use of the first and other sons of my said daughter C. successively, according to their respective seniorities in tail male, and for default of such issue, to the use of the first and other sons of my said daughter L. successively, according to their respective seniorities in tail male; and from and after the decease of both my said daughters, and failure of issue male of both their bodies as aforesaid, then as to the entirety of the same hereditaments, to the use of all and every the daughter and daughters of my said son W. A. if more than one as tenants in common in tail, with cross remainders in tail, between or among them; and if all his daughters but one shall die without issue, or he shall have but one daughter, to the use of such one or only daughter in tail; and for default of such issue, to the use of all and every the daughters and daughter of my said son Edward, if more than one, as tenants in common in tail, with cross remainders in tail, between and among them; and if all his daughters but one shall die without issue, or he shall have but one daughter, to the use of such one or only daughter in tail: and for default of such issue, then as to one undivided

And after the decease of both daughters and failure of issue of both their bodies, then as to the entirety of the premises, to the daughters of testator's eldest son as tenants in common in tail, with cross remainders; and for default of such issue to the daughters of his second son in like manner; and for default of such issue then as to one moiety to the use of the daughter of testator's eld-

moiety or equal half part or share of the same hereditaments, to the use of all and every the daughter and daughters of my said daughter L. if more than one, as tenants in common in tail, with cross remainders in tail, between or among them; and if all her daughters but one shall die without issue, or she shall have but one daughter, to the use of such one or only daughter in tail: and for default of such issue, to the use of all and every the daughter and daughters of my said daughter C. if more than one, as tenants in common in tail, with cross remainders in tail, between or among them; and if all her daughters but one shall die without issue, or she shall have but one daughter, to the use of such one or only daughter in tail: and as to the other undivided moiety or equal half part or share of the same hereditaments, to the use of all and every the daughter and daughters of my said daughter C. if more than one, as tenants in common in tail, with cross remainders in tail, between or among them; and if all her daughters but one shall die without issue, or she shall have but one daughter, to the use of such one, or only daughter, in tail: and for default of such issue, to the use of all and every the daughters and daughter of my said daughter L. if more than one, as tenants in common in tail, with cross remainders in tail, between or among them; and if all her daughters but one shall die without issue, or she shall have but one daughter, to the use of such one or only daughter in tail: and from and after the decease of both of my said daughters, and such failure of issue of both their bodies as aforesaid, then as to the entirety of the same hereditaments, to the use of my own right heirs. Provided always, and I do hereby declare my will and mind to be, that in the settlement so to be made as aforesaid, shall be contained a proviso, that all and every the person and persons, who, by virtue of the limitations to

No. 5.

est daughter, as tenant in common in tail, with cross remainders.

And in default of such issue to the daughters of his youngest daughter, in like manner.

And as to the other moiety to the use of the daughters of the youngest daughter, in like manner.

And in default of such issue to the daughters of the eldest daughter, in like manner.

And after the decease of both daughters, and failure of such last-mentioned issue of both their bodies, to the use of testator's own right heirs.

Clause binding the testator's descendants and possessors of his property, to take the name and use the arms of his family.*

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* It seems pretty well settled that this is not a condition precedent to the vesting, and therefore a tenant in tail may suffer a recovery without troubling himself to take the name, if he objects to it. Upon this question being put to the late Mr. Fearne, however, though he thought it not absolutely necessary, yet he said he would advise it to be done on the party's coming of age, before

No. 5. be therein contained, or of this proviso, shall become entitled to the possession, or to the rents, issues, and profits of the manors, and other hereditaments, in such settlement to be comprised, and who shall not then be called by the name, or use the arms of H. except as hereinafter excepted, or otherwise provided, do and shall, within the space of one year next, after they respectively shall become entitled to the possession, or to the rents and profits thereof: and also, that all and every the person or persons, whom the said L. or any issue female of my said sons or daughters respectively shall marry, shall and do, if the said L. or such other issue female respectively, as aforesaid, shall, at the time of such her or their marriage, or respective marriages, be so entitled as aforesaid, then within one year next, after the solemnization of the said marriage, or marriages, respectively; and if the said L. or such other issue female respectively as aforesaid, shall not be entitled at the time of such her or their marriage, or respective matriages, but shall afterwards, during her or their marriage, or respective marriages, become so entitled as aforesaid, then within the space of one year next after she or they shall severally become entitled as aforesaid, take upon himself, herself, and themselves, and use in all deeds and writings, whereto or wherein he, she, or they shall be a party or parties, and upon all other occasions, the surname of H. only, and no other surname: and also shall and do quarter the arms of H. with his, her, or their own family arms; and shall and do, within the space of one year, apply for, and endeavour to obtain an act of parliament, or proper licence from the crown, or take such other means as may be requisite and proper, to enable and authorize him, her, or them respectively to take, use, and bear the surname and arms of H.; and that in case any such person or persons shall refuse or neglect, or discontinue to take and use, such surname and arms, and to take such proper steps and means as may be requisite to enable and authorize him, her, or

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suffering the recovery, and the recovery to be suffered in the name directed to be assumed, to prevent all questions on the point. See the case of Gulliver v. Ashby, 4 Burr. 19291. Blackst. 607.

them so to do, within the space of one year as aforesaid, then from and after the expiration of the said space of one year, the use or estate, or uses or estates, so to be limited to him, her, or them respectively, so neglecting or refusing, shall cease, determine, and become utterly void, and that all the said manors, and other hereditaments, hereinbefore directed to be conveyed, and settled as aforesaid, shall in such case, immediately thereupon, go to the person or persons next in remainder, under the limitations in such settlement to be contained, in the same manner as if such person or persons, so neglecting or refusing, being tenant or tenants for life, were dead, or being tenant or tenants in tail male, or in tail, were dead without issue inheritable under the estate tail, or estates tail, then vested in possession, or in remainder, in the person or persons so refusing or neglecting: provided always, and I do hereby expressly declare my will and mind to be, that the clause hereinbefore contained for compelling the persons hereinbefore mentioned, to use the name and arms of H. shall not extend to any person or persons, who shall, under any will or other instrument whatsoever, made prior to the 1st day of January, ——, be under any previous obligation of using any other family name, or bearing any other family arms. And I do hereby declare my will to be, that in such settlement shall be contained a power to enable the person or persons, who, for the time being, shall, by virtue of the limitations in such settlement to be contained, be entitled to the said manors and hereditaments hereinbefore directed to be conveyed and settled as aforesaid, for an estate of freehold, to grant, demise, limit, or appoint all and singular the said hereditaments, or any of them, or any part thereof, for any term or number of years, not exceeding 21 years, at the most improved rent, without taking any fine, and under the usual restrictions, so nevertheless that no such lease of all or any part of the hereditaments, comprised in the said term of 2000 years, be made to commence prior to the 29th day of September, which will be in the year of our Lord ———. And I do hereby also direct, that in such settlement, so to be made as aforesaid, there be contained a power, enabling the said Sir G. C., R. M., J. D., J. C. J., and J. F., and the survivors and sur-

No. 5.

Settlement to contain a power of leasing.

No. 5. vivor of them, and the executors and administrators of such survivor, from time to time, to demise or lease all and singular the hereditaments comprised in the said term of 2000 years, or any of them, or any part or parts thereof, for any term or number of years in possession, determinable on or before the said 29th day of September, which will be in the said year of our Lord, at the most improved rents, without taking any fine, and under the same restrictions; and also a power to enable the said Sir G. C., R. M., J. D., J. C. J., and J. F., and the survivors and survivor of them, and the executors and administrators of such survivor, from time to time, and at any time or times hereafter, at the request, and by the direction of the person or persons who, for the time being, shall be entitled to the hereditaments, to be comprised in the settlement hereby directed to be made as aforesaid, for an estate of freehold, either in possession, or in remainder, immediately expectant upon the said several terms of 99 years, and 200 years respectively, signified by some writing under the hand and seal, or hands and seals of such person or persons, attested by two or more credible witnesses, to make sale of, or to convey in exchange for, or in lieu of other hereditaments, all or any of the hereditaments to be comprised in the settlement so to be made as aforesaid, the fee simple and inheritance thereof, as well as for the said terms of 99 years, and 200 years respectively, due regard being had to the proviso next hereinafter contained or expressed, with the usual clauses, making the receipts of the said Sir G. C., R. M., J. D., J. C. J., J. F., or the survivors or survivor of them, or the executors or administrators of such survivor, effectual discharges to the purchaser or purchasers of the hereditaments which shall be so sold, and the usual directions to lay out the money to arise by such sale or sales, in

Also a power to enable the trustees to sell or exchange.

And to purchase, with the money arising from such sale, other lands, and to settle the newly purchased lands, or such as are taken in exchange, to like uses.*

Where the estate directed to be purchased cannot be had, other lands may be bought.

* Where a will, directing money to be laid out in land, points to a particular estate, if that fails, it may be laid out in other lands, the particular direction being only a mode of executing the primary intention to purchase lands, 10 Vez. Jun. 618. This has been decidedly holden by the present Lord Chancellor, though Lord Thurlow used to differ with Lord Roslyn on this question,

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the purchase of other freehold lands of inheritance, or of copyhold lands, convenient to be held with the lands to be comprised in such settlements as aforesaid, or any of them, or so to be purchased or taken in exchange, in pursuance of this my will, and to settle the lands so to be purchased, or so to be received in exchange as aforesaid, to such uses as the hereditaments, which shall be so sold or conveyed in exchange, stood settled, and limited respectively, immediately before such sale or exchange, or as near thereto as the nature of the tenure and circumstances will permit, any thing hereinbefore contained to the contrary thereof in any wise notwithstanding. Provided always, and I do hereby declare my will to be, that no manors, messuages, lands, tenements, or hereditaments, situate, lying, and being, in the parishes of ——, and ——, respectively, or any of them, shall be sold, aliened, or disposed of, except in exchange for, or in lieu of, hereditaments in the parishes of A. and B. in the said county of N. respectively, or one of them, and two pieces of ozier ground, or meadow, lying in the last-mentioned parishes, or one of them, or partly there, and partly in some other parish or parishes, abutting east, on a brook or rivulet that runs through the commons of —— and ——, and is there the boundary of the parish of G. against the said parishes of A. and B. And further, that no sale, alienation, or disposition as last mentioned, shall be made of the alternate right of presentation to the rectory of K. except for the

Limitations restricting the exercise of the last-men- oned wer as certain ecific jects.

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the latter lord being of the opinion to which Lord Eldon has since added the weight of his authority.

Whether money directed to be laid out in land, in a particular place, shall, if land cannot be procured there, be laid out elsewhere, has been left undecided by the present chancellor. Lord Rosslyn was of opinion it might, Lord Thurlow that it could not, see 10 Vez. Jun. 610. But as Lord Eldon held the affirmative on the other question, when it came before him a short time afterwards, a conjecture may be allowed as to the probable result, if his Lordship were now called upon to settle the point where the place, and not the estate, was particularised. See Maynwaring *v.* Maynwaring, 3 Atk. 414. Oldham, *v.* Hughes, 2 Atk. 458.

Where the place, and not the estate is specified

No. 5. actual exchange of, or for the alternate right of presentation to the rectory of A. in the said county of N. upon such terms as the said Sir G. C., R. M., J. D., J. C. J., and J. F., or the survivors or survivor of them, or the executors or administrators of such survivor shall judge proper. And my will is, and I do hereby declare, that there shall likewise be inserted in the said settlement, all such further and other additional clauses, declarations, agreements, powers, and provisos, as the counsel of the said J. W. and Sir R. J. B., or the survivor of them, or the executor or administrator of such survivor shall advise to be proper or expedient, but conformable to the general spirit and intent of this my will.

Other clauses to be inserted in the settlement as counsel shall advise, but to be conformable to the spirit of the will.

Trust of the term of 99 years, to raise an annuity for the person named.

And I do hereby declare, that the said term of 99 years hereinbefore limited in use to them the said Sir G. C., R. M., and J. D. of and in the hereditaments and premises in N. as aforesaid, is so limited to them, and that they, the said Sir G. C., R. M., and J. D. and the survivors or survivor of them, and the executors and administrators of such survivor shall stand, and be possessed of, and interested in the same, and the hereditaments therein comprised, upon the trusts, and to and for the intents and purposes, and under and subject to the provisos hereinafter declared or expressed, of and concerning the same, that is to say, in trust by mortgage of the hereditaments comprised in the same term, or a competent part, or competent parts thereof, from time to time, and by and out of the rents, issues, and profits thereof, or by any of the said ways and means, or by any other such ways and means as to the said Sir G. C., R. M., and J. D., or the survivors or survivor of them, or the executors or administrators of such survivor shall seem meet, to levy and raise, by even and equal quarterly payments or portions, one annuity, or clear yearly sum of 400*l.* of lawful money of Great Britain, during the life of my said brother R. H. and for one year after his decease, free from all deductions or abatements whatsoever, and also all such sum and sums of money as shall be sufficient to pay and reimburse to the said trustees respectively, their respective executors and administrators, all costs, charges, losses, damages, and expenses, which they respectively shall or may sustain, expend, or be put unto, in, or about the levying or raising the said

annuity, or yearly sum of 400*l.* or any part thereof, or in anywise relating thereto, and from time to time, by and out of the said annuity, or yearly sum of 400*l.* as the same shall be received, in the first place to make such allowances to my said brother R. H. as are now usually made to him, and to defray and pay the other charges and expences now usually incurred for his maintenance, together with such further additional sums as the said Sir G. C., R. M., and J. D., or the survivors or survivor of them, or the executors or administrators of such survivor may deem requisite or proper, for his additional comfort or convenience, and also all expenses attending the funeral of my said brother, and all just debts as may be owing by him, or on his account, at the time of his death, and from time to time to pay the residue of the said annuity or yearly sum of 400*l.* after answering all and every the purposes aforesaid, to the person or persons who shall, for the time being, be intitled to an immediate estate of freehold, of and in the hereditaments comprised in the said term of 99 years, expectant on the same term, or to the receipt of the rents, issues, and profits thereof, for his, her, or their own absolute use and benefit. Provided always, and I do hereby declare my will to be, that from and after the trusts and purposes by this my will declared or expressed, of or concerning the said term of 99 years, shall be fully performed and satisfied, or shall become unnecessary or incapable of being performed, or be otherwise discharged, the said term of 99 years, of and in the said hereditaments comprised therein, or so much thereof as shall not have been mortgaged for the purposes aforesaid, shall cease, determine, and be absolutely void to all intents and purposes whatsoever. And I do hereby declare, that the said term of 2000 years hereinbefore limited in use to them, the said Sir G. C., C. M., J. D., J. C. J., and J. F., their executors and administrators as aforesaid, is so limited to them, and that they the said Sir G. C., R. M., J. D., J. C. J., and J. F., their executors and administrators, shall stand possessed of, and interested therein, upon the several trusts, and to and for the several intents and purposes. and with, under, and subject to the several powers, provisos, restrictions, and declarations following, that is to say, upon trust, that they, the said Sir G. C.,

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Proviso for cesser of the term when the trusts shall be fulfilled.

Trusts of the term of 2000 years to aid the personal estate, if insufficient in paying the debts, charges, and legacies, and to defray the expence of keeping the premises comprised in the term in

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repair; to pay the expences of renewals of renewable leases, and fines upon admittances to copyholds; to pay the expence of purchasing cottages and common rights, and of inclosure; a salary to the receiver of the rents of the estates comprised within the first term; to pay additional portions, and to satisfy such securities as shall have been given for the same; and to raise a sum by way of jointure for such woman as testator's younger son may marry, and to lay out the residue in the funds, to accumulate for 20 years of the term as a fund subject in the first place to satisfying the aforesaid trusts, and then to answer the aftermentioned objects.

R. M., J. D., J. C. J., and J. F., and the survivors and survivor of them, and the executors and administrators of such survivor, shall and do, by mortgage or sale of the hereditaments, and real estate, comprised in the said term, or a competent part, or competent parts thereof, from time to time, and by and out of the rents, issues, and profits thereof, or by cutting down timber, or other trees, so nevertheless that no timber or other trees be cut down without the consent in writing of the person or persons, for the time being, intitled to the next immediate estate of freehold of and in the said hereditaments comprised in the said term of 2000 years expectant on the said term, or by all or any of the said ways and means or by any other such ways and means as to the said Sir G. C., R. M., J. D., J. C. J., and J. F., or the survivors or survivor of them, or the executors or administrators of such survivor shall seem meet, levy and raise such sum and sums of money as shall be sufficient to pay, and shall and do accordingly pay, after my personal estate not hereby specifically bequeathed shall be applied so far as the same shall extend, my funeral expences, and the expences of proving this my will, and the pecuniary legacies, (except the additional portions) and the annual sums for my younger children, hereinafter directed to be raised or paid and given, and all my bond, simple contract, and other debts, and the interest of such debts as carry interest, as the same shall become due, and all arrears thereof, and all the expences of keeping the said several premises comprised in the said term of 2000 years, in good order and repair, and the taxes, assessments, and out-goings in respect thereof payable by the landlord, and the expences of renewing from time to time the leases of my several leasehold estates hereinafter bequeathed until the whole beneficial interests therein respectively shall vest in any person or persons absolutely, (so nevertheless that no renewal shall be taken of the lease of the manors of S———, and the lands and tenements hereinafter mentioned to be holden by lease under the crown, without the consent of such person or persons as hereinafter mentioned) and also the expences of all admittances to copyhold estates under this my will, and the expences attending the purchase of any cottages, with the appurtenances and commonable rights within the parish of F.

aforesaid, which the said Sir G. C., R. M., J. D., J. C. J. and J. F., or the survivors or survivor of them, or the executors or administrators of such survivor shall judge it expedient to purchase, so as the consideration-money for the whole of such purchases do not exceed the sum of ——*l.* and so as the hereditaments so to be purchased be settled and assured to such uses, and upon, to, and for such trusts, intents and purposes, and with, under, and subject to such powers, provisos, limitations, and declarations, as at the respective times of such purchase or purchases being made, shall be subsisting or capable of taking effect as to the hereditaments and premises comprised in the said term of 2000 years, under or by virtue of this my will, or of the settlement hereinbefore directed to be made as aforesaid, and also all expences attending any inclosure of the common of F. and the planting thereof or otherwise improving the same; and the expences of my trustees and executors in the execution of this my will, and the trusts and powers herein contained, and a proper and sufficient salary or allowance to the person or persons who for the time being shall be employed in managing my estates comprised in the said term of 2000 years, and receiving the rents and profits thereof, and keeping books and accounts for my trustees for the time being, of all matters relating to this my will, and the trusts herein contained or expressed: and in the next place levy and raise, and pay such additional portions for my daughter L. and my said son E. as are hereinafter mentioned, when and as the same respectively shall become due and payable, and be called in and demanded, or discharge and satisfy such securities as may have been given for the same, and all mortgages which shall have been made for raising the same, and also such annual sum for or in the nature of a jointure for any woman with whom my said son E. shall happen to marry, as hereinafter is mentioned, and such sum in gross for the benefit of the younger sons and daughters of my said son E. as hereinafter is mentioned, and all such sum and sums of money as shall be sufficient to answer all and every the payments hereinafter directed to be made out of the money to arise or be received under or by virtue of the trusts of the said term of 2000 years; and shall and do accumulate from time to time No. 5.

No. 5. for and during and unto the full end and term of 20 years, to commence and be computed from the time of my decease, so much of the rents, issues, and profits of the said hereditaments and premises comprised in the said term of 2000 years, as shall not be from time to time applied for some or one of the purposes aforesaid, according to the direction aforesaid, and lay out and invest the same from time to time in the names or name of them my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, in some of the public funds, and from time to time accumulate the dividends, interests, and proceed of such funds, or so much thereof as shall not be applied for some or one of the purposes aforesaid, and lay out and invest the same in like manner, and so in like manner accumulate the dividends, interests, and proceeds of such other funds, or so much thereof as shall not be applied as aforesaid; to the intent that in this manner a fund may be established for answering the purposes aforesaid, and also the purposes hereinafter mentioned, out of which fund I direct the same or such of them as shall from time to time remain unsatisfied and be capable of being carried into effect, to be answered and carried into effect. And my will is, and I do hereby direct and appoint that by and out of the said fund so to be established as aforesaid but not otherwise, after the several purposes aforesaid, or such of them as shall be capable of being carried into effect shall be satisfied, the trustees or trustee for the time being of the said term of 2000 years, hereby limited or created, shall pay off and discharge all mortgages, securities, and charges which shall have been made of or upon any of my estates in pursuance or by virtue of this my will, besides such mortgages as are hereinbefore directed to be paid, and in the next place shall pay off and discharge so far as the said fund shall extend, such mortgage or mortgages and securities as may then have been made in pursuance or by virtue of or under the said indenture of the — day of ———, or any part or parts thereof, for the purposes of raising all or any of the portions thereby directed to be raised, or any of them, or any part or parts of them, or of any of them; and in case the said last-mentioned portions or any part or parts thereof respectively, shall not have been so

Trustees out of the said fund to discharge mortgages upon any of the testator's estates.

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Testator gives his leaseholds not before bequeathed to trustees, in the first place, out of the rents and profits, to pay the rents, the expences of performing the covenants, and of renewals, and subject thereto to stand possessed thereof upon trusts to correspond as nearly as may be

secured, then in trust to pay off and discharge such of the said portions or such part or parts thereof as shall not have been so secured: And I give and bequeath all my leasehold lands and tenements not hereinbefore bequeathed as aforesaid, nor included in any settlement made by me previous to the making of this my will, unto the said Sir G. C., R. M., J. D., J. C. J., and J. F., their executors and administrators, for all my term and terms, estate and interest therein respectively, in trust in the first place out of the rents and profits thereof, to pay the rents reserved and to be reserved by the respective leases under which the same are or shall be holden, and to perform and pay the expences of performing the covenants and agreements in such leases respectively contained on the lessees or tenants' parts, and to pay the taxes payable by the landlord in respect thereof, and to renew and pay the expences of renewing such leases from time to time, at the accustomed times of renewal, and subject thereto, to stand and be possessed and interested of and in the same respectively, upon such trusts, (2) and to and for

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Of the effect of the clause directing leaseholds to be settled as far as the law will allow, upon trusts correspondent to the uses of the freehold.

(2) By a limitation of leaseholds or mere personal chattels in strict settlement where the personal estate is either included in the same limitation as the freehold, or limited with reference to such limitations of the freeholds, the first tenant in tail that comes into esse, becomes absolutely entitled to the personal property, subject to the preceding particular estates therein, and this of course frequently produces a separation between the real and personal estate. See Gregory v. Pelham, 5 Bro. P. C. 435. and the Duke of Bridgewater v. Egerton, 2 Vez. 122. and Duke of Marlborough v. Spencer, 5 Bro. P. C. 592. But this vesting may be postponed by specific limitations to a more distant period, and the estate made to accompany still further the freehold estates. The settler may suspend the absolute vesting of the leasehold estates to any period not exceeding 21 years, after a life or lives in being. In reference to these modes of continuing the personal estate in the channel of the real estate, wills and settlements frequently vest the leasehold property in trustees, directing them to settle them according to the limitations of the freehold *as far as the law will allow*, or in terms of similar import. Lord Hardwicke treated these words as affording a ground for a court of equity, to model the limitations accord-

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with the uses, trusts, &c. before declared and limited of and concerning

such intents and purposes, and with, under, and subject to such powers, provisos, conditions, restrictions, limitations, and declarations, as will best and nearest correspond and agree with the uses, trusts, powers, provisos, conditions, restrictions, limitations, and declarations, hereinbefore limited, declared or expressed, of or concerning the hereditaments

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ingly; for he thought that this clause was to be considered as executory and directory, and that it was for that Court to direct such conveyance as would make the interests in both species of estates, correspond as far as by law was practicable, or in other words, as far as the settler or testator could himself have done; and it was plain he might have limited them to A. for life, remainder to his first son, and the heirs male of his body, and if such first son died before the age of 21, and without issue male, remainder over to his second son; he might have made the same limitations over to all the other sons, and in default of such issue, he might have limited the remainder over; and in case no son had lived to attain the age of 21, the remainder would have been clearly good. It was said by Lord Hardwicke, that that was the common and known way of conveyancing in settling chattels, and that where things were directed to go as heir-looms with an estate, or in case of a marriage settlement, or the like, so far as they could by law or equity, it was very proper it should be left to the court to settle the conveyance. See Gower *v.* Grosvenor, Barnardiston's Rep. in Ch. 54. and Trafford *v.* Trafford, 3 Atk. 347. But other cases have held that these words, "as far as the law will allow," do not necessarily import a desire that the chattels should be kept in the channel of succession as long as the ingenuity of conveyancers might contrive; but that they must be understood as being meant only to direct that estates may be taken in the personal property as nearly correspondent as the law allows, having respect to their different natures. And this was Lord Thurlow's opinion, in Vaughan *v.* Burslem, 3 Bro. C. C. 101. who there held that when the first son came into esse, he was absolutely entitled under such a directory clause; see Foley *v.* Barnell, 1 Bro. C. C. 274. It appears that Lord Eldon had considered the question as settled by the two cases of Foley *v.* Barnell, and Vaughan *v.* Burslem, for in the Countess of Lincoln *v.* the Duke of Newcastle, 12 Vez. Jun. 218. he said that if he had decided that cause originally he should have decided it according to Vaughan *v.* Burslem, as considering himself bound by that case,

hereinbefore devised and directed to be settled as aforesaid, (other than and except the said terms of 99 years, and 2000 years hereby limited, and the trusts thereof), but so as such leasehold premises be not considered as an interest vested in equity, in any person who would become entitled in equity to the whole interest therein, until such person shall attain

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the freehold property, (except the said terms of 99 and 2000 years)

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and Foley *v.* Barnell, though he would confess he thought Lord Hardwicke's the better doctrine. He acquiesced in the opinion of the other Lords who modified the decree upon the principle laid down by Lord Hardwicke. In the said case of Lady Lincoln *v.* the D. of N. the tenant in tail having arrived at 21 before the cause came on upon the appeal, it was only necessary to determine that the leasehold estate should be assigned absolutely to him, and all the succeeding directions of the decree which had prospectively carried on the limitations upon the plan adverted to by Lord Hardwicke, in Gower *v.* Grosvenor, were left out, so that the decree, as it finally stood, affords no precedent for the form of the limitations to be adopted in order to carry into effect the directory clause above-mentioned. His Lordship said that according to his opinion, the best principle would be that the testator ought to be considered as furnishing the Court with all the means of enabling the party to tie up the property, not as long as the rules of law would admit, but to that convenient extent which would enable the Court to execute the general primary purpose of the will or settlement to carry together the real and personal estate. And that principle clearly was not executed by the manner in which it was proposed to be done by the decree in that case; for by Lord Hardwicke's method, and the method pursued in the decree, it was not to go over upon the simple contingency of the death under 21, but upon the event of the son's dying under that age and without issue. Now under this form of limitation the son might upon arriving at the age of 14, bequeath the estate subject to the contingency of his dying under 21, not leaving issue, and supposing he died intestate, under 21 leaving issue, that issue male would not take the leasehold as he would the real estate, but the leasehold would be part of his general personal estate, which might go to the next of kin and equally to the wife with them. And if the going over were made to depend upon the simple contingency of the dying under 21, without regard to issue, then if an infant son died, leaving issue, the real and personal es-

No. 5. the age of 21 years, yet so nevertheless as not to deprive such person during his, her or their minority, of the clear rents, issues, and profits thereof. And my will is, and I do hereby direct, that as soon as may be after my decease, a catalogue of all my books shall be taken, and an inventory made of all my plate, linen, china, pictures, prints, furniture, and household goods at ——— house, such inventory to be made by two or more persons used and accustomed to business of this kind, one of them to be named by my eldest son, and the other or others by the said Sir G. C., R. M., J. D., J. C. J., and J. F., or any two or more of them, and three copies at least of the said catalogue and inventory respectively, shall be made and signed by the persons taking the same respectively, one copy of which said catalogue and inventory respectively shall be delivered to my eldest son, one to my youngest son, and one to the said Sir G. C., R.

but so as not to be considered as vested in equity in any person who would become entitled in equity to the whole interest therein, until such person shall attain 21.

A catalogue of the books, and an inventory to be made of the plate, linen, china, pictures, prints, furniture, &c.

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tates would be separated, the real going to such issue in tail, and the leasehold going to the next remainder-man. Lord Eldon, however, did not suggest any other mode; and I am not aware of any other or better now in use among conveyancers. The attempt is subject to great danger and difficulty. These rules and observations apply to all personal estates, chattels, and goods where they are directed to go along with and accompany the freehold uses and estates, as far as the law will allow. And where the will directs the trustees, as to certain specific articles, to settle the same so as that they shall go with, and be annexed to the property of the mansion house, and premises, as heir-looms, the principles above considered are equally applicable. But where the will is not directory of a settlement, but limits the chattel to go as an heir-loom, it seems the first tenant in tail who comes into esse, will take it absolutely; see the Duke of Bridgewater *v.* Egerton, 2 Vez. 121. 1 Bro. C. C. 280 (n.) Gower *v.* Grosvenor, Barn. Ch. R. 54. Foley *v.* Barnell, 1 Bro. C. C. 274. and Vaughan *v.* Burslem, 3 Bro. C. C. 101. And whether a testator without interposing trustees directs that the chattels shall go as heir-looms with his real estate, or gives the chattels to trustees without words directory of any settlement to be made by them, but simply in trust to permit them to go with the manor-house, or to be enjoyed by such person or persons as shall

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M., J. D., J. C. J. and J. F., or one of them; such last-mentioned copy of the said catalogue and inventory to be kept and preserved, with the books, papers, and receipts, relating to the trust estate as aforesaid: and I direct that no articles whatever be removed from my said house until such catalogue and inventory shall be taken and signed. I bequeath to my dear wife all the furniture in the house at ———; I give and bequeath all my horses, and other cattle, and other my live stock, and all my farming and gardening implements and utensils, and also all wines, liquors, stores, and provisions, in or about my house at ———, aforesaid, to my said eldest son, absolutely; I give to my daughter L. the whole of the furniture belonging to and commonly used in her apartments in ——— house, and to my younger son all my books, plate, china, pictures, linen, household goods and furniture, in the chambers he now resides in or may reside in, or occupy at the time of my decease, and also [various specific bequests].

One to be delivered to testator's eldest son E—, one to the youngest son, and another to the trustees.

No articles to be removed until such inventory and catalogue shall be made.

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be, from time to time, under the will entitled to it, for so long time as the rules of law and equity will permit, the consequence will be the same. See the case of Carr *v.* Lord Erroll, 14 Vez. Jun. 478.

No. 6.

A regular Settlement upon the Testator's Family.

Limitations in strict settlement to testator's sons.

THIS is the last will and testament of me, J. B., &c. First, I give and devise all and singular my freehold manors, messuages, lands, tenements, hereditaments and real estates, whatsoever and wheresoever, together with their and every of their rights, members, and appurtenances, unto J. S. and S. J., their heirs and assigns for ever, to the several uses, upon and for the trusts, intents and purposes hereinafter limited, expressed and declared, of and concerning the same, (that is to say,) to the use of my eldest son, G. B. and his assigns, for and during the term of his natural life, without impeachment of or for any manner of waste, and from and immediately after the determination of that estate, by forfeiture or otherwise, in his life time, then to the use of the said J. S. and S. J. and their heirs, for and during the natural life of my said son, upon trust, to support and preserve the contingent uses and estates hereinafter limited, from being defeated or destroyed, and for that purpose to make entries and bring actions, as occasion may require; but nevertheless to permit my said son and his assigns during his life, to receive and take the rents, issues and profits of the said manors and other hereditaments, for his and their own use and benefit, and from and immediately after his decease, then to the use of the first son of the said G. B., lawfully to be begotten, and of the heirs male of the body of such first son lawfully issuing, and for default of such issue, then to the use of the second, third, fourth, and all and every other the son and sons of the said G. B., lawfully to be begotten, severally, successively, and in remainder, one after another, as they shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body and bodies of all and every such son and

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sons lawfully issuing, the elder of such sons and the heirs male of his body always to be preferred, and to take before the younger of such sons and the heirs male of his and their body and bodies; and in default of such issue, then to the son of my second son, J. B., and his assigns, for and during the term of his natural life, without impeachment of or for any manner of waste, and from and immediately after the determination of these estates, by forfeiture or otherwise, in his life-time, then to the use of the said J. S. and S. J. and their heirs, for and during the natural life of the said J. B., upon trust, to support and preserve the contingent uses and estates hereinafter limited from being defeated or destroyed, and for that purpose to make entries and bring actions as occasion may require; but nevertheless to permit my said son J. B. and his assigns during his life, to receive and take the rents, issues and profits of the said manors and other hereditaments, for his and their own use and benefit, and from and immediately after the decease of the said J. B. then to the use of the first son of the said J. B., lawfully to be begotten, and of the heirs male of the body of such first son, lawfully issuing, and for default of such issue, then to the use of the second, third, fourth, and all and every other the son and sons of the said J. B., lawfully to be begotten, severally, successively and in remainder, one after another as they shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing, the elder of such sons and the heirs male of his body always to be preferred and to take before the younger of such sons, and the heirs male of his and their body and bodies, and in default of such issue, then to the use and behoof of my third, fourth, and all and every other my son and sons hereafter to be born, severally, successively, and in remainder, one after another as they shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing, the elder of such sons, and the heirs male of his body always to be preferred and to take before the younger of such sons and the heirs male of his and their body and bodies, and for default of such issue, then to the use of all

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To the daughters, as tenants in common, with cross remainders.

and every my daughter and daughters, equally to be divided between or amongst them, if more than one, share and share alike, as tenants in common, and of the several and respective heirs of the body and bodies of such daughter and daughters lawfully issuing, and in case there shall be a failure of issue of the body or bodies of any of such daughters, then as to the share or shares (as well surviving or accruing as original) of such of them whose issue shall so fail, to the use and behoof of the survivors or survivor, and others or other of them, equally to be divided between or amongst such survivors and others (if more than one) share and share alike, as tenants in common, and of the several and respective heirs of the body and bodies of such surviving and other daughter or daughters lawfully issuing, and in case all my daughters but one shall die without issue, then to the use and behoof of such one daughter and the heirs of her body lawfully issuing, and in default of such issue, then to the use of the heirs of my body, and in default of such issue then to the use of my wife M. B. and her assigns for her life, and from and after her decease, to the use of my brother T. B. his heirs and assigns for ever.

Remainder to the heirs of testator's body; remainder to his wife for life; remainder to testator's right heir.

Provided always, and my will is that it shall be lawful for my said son G. B., during his life, and also for my said son J. B. during his life, in case he shall come into possession of my said estates, to demise and lease all or any part of my said estates hereinbefore devised unto any person or persons, for any term or number of years not exceeding 21 years in possession, at the best or most improved yearly rent or rents that can be reasonably gotten for the same, and without taking any thing by way of fine for or in respect of any such demise or lease, so that the lessee or lessees be not made dispunishable of waste by any express words therein, and do execute a counterpart thereof.

Leasing power.

Provided also, and my will further is, that it shall be lawful for my said sons, G. B. and J. B. severally and respectively, as and when they shall respectively be in the possession of my said manors, messuages, lands, tenements and hereditaments hereinbefore devised by any deed or deeds sealed and delivered in the presence of, and attested by two or more creditable witnesses, to grant, limit or appoint any annual sum

Jointuring power.

or yearly rent-charge not exceeding 500*l.* clear of all taxes and deductions whatsoever, to be issuing out of the said manors and other hereditaments hereinbefore devised, or any part thereof, to or for the use of any woman or women whom they may respectively marry, for the life or lives of such woman or women, by way of jointure, and in bar or without being in bar of dower, such grant, limitation or appointment to be made either before or after marriage, and with such powers and remedies of distress and entry and perception of the rents and profits of the said manors and other hereditaments, and such term or terms of years, for the better securing and compelling the payment of such annual sum or yearly rent-charge, as to them my said sons respectively shall seem meet. Provided also, and my will further is, that it shall be lawful for my said son G. B., by any deed or deeds, or by his last will and testament, or any codicil thereto duly executed and attested, to subject and charge my said manors and other hereditaments hereinbefore devised, or any part thereof, to and with the payment of any sum or sums of money, not exceeding the sum of 10,000*l.* for the portion or portions of any daughter or daughters, or younger son or sons of him the said G. B. (but so that the same be not made to vest in sons under the age of 21 years, or in daughters whilst under that age and unmarried) with such benefit of survivorship or accruer between or amongst them if more than one, and with such yearly sum or sums in the mean time, till such portion or portions shall become payable for maintenance and education, but not exceeding the interest of such portion or portions, at and after the rate of four pounds per cent. per annum; and also to limit such term or terms of years to trustees, for raising the same, and securing the payment thereof in the usual manner, as to him, the said G. B., shall seem meet. Provided also, and my will further is, that if my said son G. B., shall not charge my said manors, and other hereditaments, with the full sum of 10,000*l.* for the portions of his younger children, or if the full sum of 10,000*l.* shall not eventually become payable for such portions, then it shall be lawful for my said son, J. B., in case, and when he shall come into the possession of the same manors and

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Power for the eldest son to raise portions for younger children.

Similar power to the second son to a restricted extent.

No. 6. hereditaments, by any deed or deeds, or by his last will and testament, or any codicil thereto, duly executed and attested, to subject and charge the same manors, and other hereditaments, or any part thereof, to and with the payment of any sum or sums of money, for the portion or portions of any daughter or daughters, or younger son or sons of him, the said J. B. not exceeding such a sum, as with what shall become payable for the portion or portions of the younger child or children of the said G. B. will make up the sum of *10,000l.* or not exceeding the sum of 10,000*l.*, in case no sum at all shall become payable for the portion or portions of the younger child or children of the said G. B., (but so that the same be not made to vest in sons, under the age of 21 years, or in daughters, whilst under that age, and unmarried,) with such benefit of survivorship or accruer between or amongst them, if more than one, and with such yearly sum or sums in the mean time, till such portion or portions shall become payable, for maintenance and education, but not exceeding the interest of such portion or portions, after the rate aforesaid, and also to limit such term or terms of years to trustees, for raising the same, and securing the payment thereof, in the usual manner, as to him, the said J. B. shall seem meet.

Furniture, &c.(except plate,) provisions, ornaments of the person, (except jewels after disposed of,) to the wife, with directions to keep an inventory.

Also, I give and bequeath unto my said wife, M. B. for her own absolute use and benefit, all my linen, china, and household goods, and household furniture, of every kind and sort whatsoever (except plate). And also, all my liquors, coals, wood, and provisions of every kind, in or about my dwelling-house, or houses, at the time of my decease; and also, all the watches, rings, trinkets, and other ornaments of her person, usually worn by her, or called hers, together with all her wearing apparel, and paraphernalia whatsoever, save and except the jewels hereinafter otherwise disposed of; also, I give and bequeath unto my said wife, during her life, the use and enjoyment of all my plate, and of all the jewels she received on our marriage, of which I desire an inventory may be made and signed by her, after my decease, but recommending her to accommodate my said son G. B., or the person or persons for the time being, entitled to the possession of my estates, hereinbefore devised, in strict settlement under, or by virtue of the limitations hereinbefore contained,

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with the use of such part of the plate as she can conveniently spare, and he or they may have immediate occasion for; and from and after the decease of my said wife, I give and bequeath all my said plate and jewels unto the said J. S. and S. J., their executors and administrators, to whom I also bequeath the portraits of &c. immediately in trust for, and to permit the same respectively to be held and enjoyed by the person or persons, who shall, from time to time, be entitled to the possession of my said manors, and other hereditaments hereinbefore devised in strict settlement, and for such and the same estate and interest therein, to the intent that the same may go and be enjoyed, with such manors, and other hereditaments, as, or in, the nature of heir-looms as far as the law will permit; and in order thereto, my will is, that no person taking an estate tail, by purchase, in my said manors, and other hereditaments, or any part thereof, shall be intitled to such an absolute or vested interest in the said plate, jewels, and portraits, as would be transmissible to his or her executors or administrators, unless such person shall attain the age of 21 years, or die under that age, leaving issue inheritable under such intail, living at his or her decease. And it being my intention to make some alterations and improvements in and about my house at T., my will is, and I hereby direct, that if the same shall not be completed in my lifetime, then the same shall be completed and finished after my decease, in such manner as my executrix shall think proper and direct; and the charges and expences attending the same, shall be paid out of the rents and profits of my estates at ——— and ———, in the said county of ———, which I hereby authorise and empower my executrix to receive and take for that purpose. And my will is, that my wife, M. B., shall have the use and enjoyment for her own residence only, of my said house at T. with the stables, offices, and outbuildings, yards, gardens, lawns, plantations, and pleasure grounds thereunto belonging, and of the home close and meadow, at the bottom thereof, until my said son, G. B., or the person or persons for the time being entitled thereto, under the limitations hereinbefore contained, shall attain the age of 21 years. Also, I give and bequeath unto my said dear wife, if she shall be living, the right of presen-

Plate, jewels, and portraits to go as heir-looms.

Executors to finish the alterations and improvements intended to be made in and about the house at ——.

Testator's wife to have the use of the house for her residence till the eldest son attains 21.

And to have the right of

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presentation to the rectory of —— during the minority of the eldest son or the person entitled for the time being to the advowson.

A sum to be invested in the funds, and dividends to be paid to the wife for life, and after her decease to fall into the residue.

All the residue to be collected get in and converted into money and invested in the funds, with power to vary and transpose, &c.

tation to the rectory of T., in case, and as often as the same shall become vacant, during the minority of my said son, G. B., or of the person or persons for the time being, entitled to the advowson thereof, under the devise and limitations hereinbefore contained; also, I give and bequeath unto the said J. S. and S. J. the principal sum of 2000*l*. or thereabouts, due to me on a promissory note from the late Lord B—; and in case the same shall be received by me in my life-time, then I give and bequeath to them the sum of 2000*l*. in lieu thereof, immediately after my decease, in trust to be by them laid out or invested in, or upon government or other public stocks or funds, or upon real securities, at interest, with full power to change such stocks, funds, and securities, and those which shall be substituted in lieu thereof, for others of the like kind, as often as shall be thought expedient, and upon trust to permit my said wife to receive and take the yearly dividends, interest, or produce of such stocks, funds, or securities, for her own use and benefit, during her life, and from and after her decease, my will is, that such stocks, funds, or securities, shall fall into, and go, and be considered as part of my residuary personal estate; and I give and bequeath all the rest, residue, and remainder of my monies, stocks, funds, and securities for money, goods, chattels, and personal estate and effects whatsoever, and wheresoever, not hereinbefore disposed of, and which shall remain after payment of my debts, and funeral, and testamentary expences, unto my said wife, and the aforesaid J. S. and S. J., their executors and administrators, upon trust, to call in and convert the same into money as soon as conveniently may be after my decease, and to lay out and invest the money so to be called in, and to arise from my said residuary personal estate, in or upon government, or other public stocks or funds, or upon real securities at interest, with full power and authority to sell, dispose of, alter, vary, and change, such stocks, funds, and securities, and those which may be substituted in lieu thereof, for others of the same, or the like nature, as often as shall be thought expedient; and upon trust, as to all and singular the stocks, funds, and securities, which shall, from time to time, constitute or form part of my residuary personal es-

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tate, for all and every of my children living at my decease, and born in due time afterwards, (save and except my said son, G. B., or such other son as shall then be entitled to my said manors, and other hereditaments hereinbefore devised in strict settlement,) who being a son or sons, shall then have attained, or shall afterwards attain the age of twenty-one years, or being a daughter or daughters, shall then have attained, or shall afterwards attain the like age, or be married under that age, and for their respective executors and administrators, equally to be divided between or amongst them, if more than one, share and share alike, and if there shall be but one such child, who shall attain the age or time aforesaid, then as to the whole in trust for such one child, and his or her executors and administrators, and to transfer, assign, and make over the same accordingly, as soon as circumstances will permit; and upon further trust, until such stocks, funds, and securities shall become transferable or assignable as aforesaid, to pay, apply, and dispose of, the yearly dividends, interest, and produce of the presumptive share or shares for the time being, of the child or children, who shall not have attained the age or time aforesaid, of and in the said stocks, funds, and securities, for or towards the maintenance and education of such child or children respectively, until he she or they shall acquire a vested interest therein, or die, which shall first happen; and my will further is, that it shall be lawful for my said trustees, or the survivors or survivor of them, or his or her executors or administrators, at their, his, or her discretion, to apply and dispose of any part or parts, of the presumptive share or shares, for the time being, of any son or sons, under the age of 21 years, of and in the said stocks, funds, and securities, for placing him or them out in any profession, business, or employment, or for his or their instruction therein, or otherwise for his or their benefit or advancement in the world, notwithstanding such share or shares shall not then have become vested; and in case all my said children, except my said son G. B., or the son, who at my decease shall be entitled to my said manors, and other hereditaments hereinbefore devised in strict settlement, shall die, without any of them having acquired a vested interest in the said stocks

To apply the same for the benefit of the younger children.

To be equally divided.

With power to apply their presumptive shares for and towards their maintenance.

And for their advancement in the world.

And if all the children die except G. B., then the whole in trust for the eldest or other

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son entitled to the settled hereditaments to transfer the same to him when of age, and in the mean time to apply the dividends towards his maintenance, and if he shall die under age, in trust for the wife during life, and after her decease to testator's brother.

funds, and securities, then my will is, and I hereby direct, that my said trustees shall stand, and be possessed of all such stocks, funds, and securities (save and except such part thereof, if any, as may have been applied for the advancement of any younger son or sons, whilst under age as aforesaid,) in trust for him, my said son, G. B., or such other son as shall, at my decease, be entitled to my said manors, and other hereditaments hereinbefore devised in strict settlement; and to transfer, assign, and make over the same to him accordingly, at his age of 21 years, or as soon after as circumstances will permit, and in the mean time to apply the yearly dividends, interest, or produce, or any part thereof, for or towards his maintenance and education; and in case of his decease, under the age of 21 years, then upon trust for my said wife, M. B., for and during her life, and after her decease in trust for my said brother, T. B., his executors and administrators, for his and their own absolute use and benefit.

The wife sole executrix and guardian.

I nominate and appoint my said wife, M. B., sole executrix of this my last will and testament; I also appoint her guardian of all such of my children as shall be infants, during their respective minorities; and I give and devise unto my said wife, and the said J. S., and S. J., and their heirs, the legal estate of all such messuages, lands, tenements and hereditaments, as are vested in me, in fee simple, or for any estate of freehold, by way of mortgage, or as a security for money, to the intent that they may be enabled to convey and dispose of the same, in such manner as occasion shall require; and my will is, and I hereby declare, that my said trustees and executors, or any of them, their, or any of their heirs, executors or administrators, shall not be charged, or chargeable with, or accountable for any more of the trust monies and premises, than they shall respectively actually receive, or shall come to their respective hands, by virtue of this my will, nor with, or for any loss which shall or may happen of the said trust monies and premises, or any part thereof, so as such loss happen without their wilful neglect or default; nor any of them, for the others, or other of them, or for the acts, deeds, receipts, disbursements, or defaults of the others, or other of them, but each of them, only for his or her own acts, deeds, receipts, disbursements, and defaults.

Indemnity clause.

And also that it shall and may be lawful to and for them my said trustees and executors, and their respective executors and administrators, in the first place, by and out of the monies which shall come to their hands respectively by virtue of this my will, to deduct, retain to, and reimburse themselves respectively all such costs, charges, damages, and expences as they shall respectively pay, bear, sustain, expend, or be put unto, for or by reason or means of the trusts hereby in them reposed, or the management or execution thereof, or any act, transaction, matter or thing whatsoever in any wise relating thereto. And lastly, I hereby revoke all former wills by me at any time heretofore made.

In Witness, &c,

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A Will with limitations of the real property to the children successively and their sons and daughters in fee with a variety of other provisions by way of annuity and otherwise.

THIS is the last will and testament of me I. S. in the county of Northampton, Esquire. I desire that my body may be deposited in the vault wherein my late dear father was buried at ——— in the county of ———, with suitable decency, but without funeral pomp. And whereas I am seized of the fee simple and inheritance of the manor of N——— in the county of N——— aforesaid, and divers hereditaments purchased by me from ————, and also divers messuages, lands, and hereditaments in the parishes of ——— A. and B. in the counties of ——, H. and D. and purchased by me from D. C. esquire, and also of divers other messuages, lands, cottages, and hereditaments at S. in the said county of N. and lately purchased by me of C. D. and

No. 7. E. F., and also of a messuage or dwelling house and divers lands and hereditaments at V. in the county of Sussex purchased by me of F. T. esquire, and also of divers messuages lands and hereditaments at L——y in the parish of T. in the said county of S. and lately purchased by me of H. P L. and his trustees. And whereas the said messuages, lands, and hereditaments at L——y are subject to the payment of the sum of 4100*l.* to L. T. S. and F. (the trustees named in an indenture of settlement bearing date, &c. being the settlement made on my marriage with my present wife M. S.) which sum was advanced by them for my use out of the trust monies of such settlement; now I give and devise my said manor and all other my freehold messuages, lands, tenements, hereditaments, and real estate whereof I have power to dispose in possession, reversion, remainder, or expectancy, (save and except the said messuage, lands, and hereditaments at V. hereinafter devised) with their and every of their rights, members, and appurtenances, subject nevertheless to such charges and incumbrances as the same premises or any of them shall be at the time of my decease subject or liable to, and subject also to the payment of the several annuities hereinafter bequeathed, to X. Y. Z. their heirs and assigns; to the uses, upon the trusts, and for the intents and purposes, and subject to the provisos and declarations hereinafter limited and contained concerning the same, that is to say; to the use of my eldest son W. S. if he shall attain the age of 21 years, or shall be married with the consent in writing of any three of the trustees for the time being of this my will which shall first happen and his assigns for the term of his natural life without impeachment of waste, and from and after the determination of that estate by forfeiture or otherwise in his life time, to the use of the said X. Y. Z. and their heirs during the life of the said W. S., upon trust by the usual means to preserve the contingent remainders hereinafter limited from being destroyed; but nevertheless to permit my said son W. S. and his assigns during his life to receive and take the rents and profits of the same premises for his and their use, and from and immediately after the decease of the said W. S., to the use

Devise of freehold and copyhold estates (except those at V.)

To his eldest son W. S. for life and after his decease,

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of such one son of my said son W. S. lawfully begotten who shall attain the age of 25 years, or be married with such consent as aforesaid, which shall first happen, as he my said son W. S. by any deed or deeds, writing or writings, to be by him sealed and delivered in the presence of and attested by two or more credible witnesses, or by his last will and testament in writing, to be signed and published by him in the presence of and attested by three or more credible witnesses shall direct and appoint, and the heirs and assigns of such son for ever; and in default of any such direction or appointment, to the use of the eldest of the sons (if more than one) of my said son W. S. who shall live to attain the age of 25 years, or be married with such consent as aforesaid, which shall first happen and the heirs and assigns of such son for ever; but if there shall be only one such son who shall live to attain such age, or be married with such consent as aforesaid; then to the use of such only son his heirs and assigns. And in case my said son W. S. shall depart this life without leaving any son who shall live to attain the said age of 25 years, or be married with such consent as aforesaid, then to the use of my second son G. S. if he shall attain the age of 25 years, or be married with such consent as aforesaid, which shall first happen, and his assigns, for and during the term of his natural life without impeachment of waste, and from and after the determination of that estate by forfeiture or otherwise in his life time, to the use of the said X. Y. Z. and their heirs, during the life of the said G. S., upon trust by the usual means to preserve the contingent remainders hereinafter limited from being destroyed, but nevertheless to permit the said G. S. and his assigns during his life to receive and take the rents and profits of the same premises for his and their use, and from and immediately after the decease of the said G. S. [like dispositions to other sons and the first of their sons who shall live to attain the age of 25 respectively.] And in case all my sons shall depart this life without leaving any son who shall live to attain the said age of 25 years, or be married with such consent as aforesaid, then to the use of the eldest of the sons of my daughter E. S. to be lawfully begotten (if more than one) who shall live to attain the age of 25 years, or be

To such one son of the said W. S. as he by deed or will shall appoint and the heirs and assigns of such son.

In default thereof to the eldest of his sons (if more than one) or an only son who shall attain 25, his heirs and assigns.

Like dispositions in favour of testator's other sons.

In default of children in the male line to the eldest of the sons of his daughter E. S. (if

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more than one) or an only son who shall attain 25, his heirs and assigns.

married with such consent as aforesaid, which shall first happen, and the heirs and assigns of such son for ever; but if there shall be only one such son of my said daughter E. S. who shall live to attain such age or be married with such consent as aforesaid; then to the use of such one only son his heirs and assigns for ever; and in case my said daughter E. S. shall not have any son who shall live to attain the said age of 25 years or be married with such consent as aforesaid, then to the use of the eldest of the sons of my daughter R. S. to be lawfully begotten (if more than one) who shall live to attain the age of 25 years, or be married with such consent as aforesaid, which shall first happen, and the heirs and assigns of such son for ever; but if there shall be only one such son of my said daughter R. S. who shall live to attain such age or be married with such consent as aforesaid, then to the use of such one only son his heirs and assigns for ever; and in case both my said daughters shall depart this life without leaving any son who shall become entitled to the said hereditaments under and by virtue of this my will, then to the use of my right heirs.

In default, &c. to the eldest of the sons of his daughter R. S. (if more than one) or an only son who shall attain 25, his heirs and assigns.

Devise of copyholds to the same uses as the freehold, or as near thereto as the tenure will permit.

And I give and devise all my copyhold and customary messuages, lands, tenements, and hereditaments (having duly surrendered the same to the use of my will) to the said X. Y. Z. their heirs and assigns, to hold the said copyhold and customary messuages, lands, tenements and hereditaments to and for the use of them, their heirs and assigns, upon such trusts, nevertheless, and to for with and subject to such uses, estates, intents, purposes, powers and provisions as shall best correspond with the uses, estates, intents, purposes, powers and provisions hereinbefore expressed, given, limited and declared of and concerning my said freehold messuages, lands, tenements, hereditaments and premises, or as near thereto as the nature and quality of such copyhold and customary estate and tenure will admit of.

Directions that a lease of the estate purchased of D. C. shall be granted to L. K. for 14 years if he shall

And I further declare my will to be, that in case my faithful farming servant L. K. shall be living at my decease, that then and in such case the person who by virtue of the dispositions hereinbefore contained shall be beneficially entitled to the possession whether for life or other greater estate of my said lands and hereditaments hereinbefore mentioned to have been purchased of D. C. esquire, or in case

such person shall be a minor his guardian or guardians shall and do within one month after my decease in case the said L. K. shall request the same, by indenture or other effectual assurance in the law containing the usual covenants, grant and demise unto him the said L. K. the same last mentioned lands and hereditaments which are now in my occupation for the term of 14 years, in case he shall so long live and continue himself to occupy the same lands and hereditaments, such term to commence and be computed from one month or 28 days after the day of my decease; and my will is, and I direct in case the said L. K. shall be living at my decease, that the farming stock and implements of husbandry which shall be upon my said lands and hereditaments which I have hereinbefore directed to be demised to the said L. K. shall, if he shall request the same, be valued by two indifferent persons, one to be chosen by him and the other by the trustees hereinafter named concerning my residuary estate or the survivors or survivor of them his executors or administrators, but in case such two persons cannot agree in such valuation then by a third indifferent and competent person to be named by the same two persons so first appointed, and that the said L. K. shall have the privilege of purchasing the said farming stock and implements of husbandry for the sum at which the same shall be so valued, and that 1000*l.* part of such sum shall and may remain secured to be paid by him to the said trustees or trustee by his bond and by a judgment to be entered thereupon in pursuance of a warrant of attorney to be executed by him, such payment to be made at the expiration of seven years from the time of my decease with interest in the mean time on such sum at the rate of 4*l.* per cent. per annum by equal half yearly payments; but in case he shall happen to die before the expiration of the said term of seven years, or become insolvent or a bankrupt, my will is that the said sum of 1000*l.* with such interest as shall be then due thereon according to the rate aforesaid, shall become immediately payable out of, and charged and chargeable upon, the farming stock and implements of husbandry which shall be upon the said lands and hereditaments at the time of such his decease insolvency or bankruptcy. And I further direct that in such lease so to be made to the said L. K. may be contained a

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so long live and continue to occupy it.

Testator directs that his farming stock shall be valued, and L. K. shall have the privilege of purchasing it at such valuation, and 1000*l.* thereof may remain for 7 years on the security of his bond, and a judgment, at interest; the same however, in the event of his death or insolvency before the expiration of such term, to become payable out of the stock which shall then be on the said lands.

No. 7. proviso for making the same void in the event of such insolvency or bankruptcy as aforesaid, and that the said bond and warrant of attorney may be so framed as that, in case of the death of the said L. K. before the said 1000*l.* and all interest shall be satisfied and paid, execution may immediately be taken out and had thereupon. I give and devise my messuage or dwelling house, and all those lands, tenements, hereditaments and premises situate and being at V. in the county of Sussex, and hereinbefore mentioned to have been purchased from F. T. esquire, with their and every of their rights, members, and appurtenances unto the said X. Y. Z. their heirs and assigns; to the uses upon the trusts and for the intents and purposes hereinafter expressed concerning the same, that is to say, to the use of the said X. Y. Z. and their heirs during the life of my wife the said M. S., in trust to permit my said wife to hold and enjoy the same during her life; but in case she shall not chuse to occupy the same, then in trust to pay the rents and profits thereof or of so much as she may not chuse to occupy, as the same shall accrue due and be received, unto such person and persons only, and for such intents and purposes only as my said wife by writing under her hand, notwithstanding any coverture, shall from time to time direct or appoint the same to be paid, and in default of and until such direction or appointment to pay the same, or so much whereof she shall from time to time make no such appointment, into her proper hands; and my will is that the receipts of my said wife under her hand, or the receipts of such person or persons as she shall appoint to receive the same as aforesaid, shall be the only effectual discharges for the same (notwithstanding any coverture) to the end that the same may be for her sole and separate use and disposal, and not subject to the debts, engagements, or controul of any person with whom she may be intermarried; and from and immediately after the decease of my said wife, upon trust that they the said X. Y. Z. or the survivors or survivor of them or the heirs or assigns of such survivor shall and do in the month of August next after her decease make sale and dispose of the said messuage or dwelling-house, lands, tenements, hereditaments, and premises situate at V. aforesaid, either together or in parcels, by public

Devise of the dwelling house and hereditaments at R—.

To trustees in trust for the use of testator's wife for her life, in case she may chuse to reside there, and otherwise to pay the rents to her for her life, for her separate use, and after her decease,

Upon trust to sell the same,

auction for the most money that can be reasonably obtained for the same. And I declare my will to be that the money which shall arise by such sale shall be considered as part of the residue of my personal estate hereinafter disposed of, and be applied accordingly, and that the receipt or receipts in writing for such money or any part or parts thereof signed by the said X. Y. Z. or the survivors or survivor of them or the heirs, executors or administrators of such survivor shall be a sufficient discharge or sufficient discharges to such purchaser or purchasers for his her and their purchase money or monies, or for so much of such money as in such receipt or receipts respectively shall be acknowledged or expressed to have been received; and that after such receipt or receipts shall have been so signed, the purchaser or purchasers of the said premises hereby made saleable or any part thereof to whom such receipt or receipts as aforesaid shall be given, shall not be obliged to see to the application or be answerable or accountable for the misapplication or nonapplication of his her or their purchase money or any part thereof. And whereas the said messuage or tenement wherein I formerly dwelt in the parish of —— in the said county of ———— was by the indenture of settlement made previous to my marriage with my said wife M. S. settled for her benefit during her life in remainder expectant on my decease, and by virtue of the said settlement I am authorised to dispose of the said premises, subject nevertheless to the said life interest of my said wife either by my last will and testament or otherwise, now I do hereby ratify and confirm the said settlement in every respect, and, subject to the said estate and interest of my said wife, and in pursuance and exercise of the power and authority thereby reserved to me, and of every other power or authority enabling me in that behalf, I give, bequeath, direct, limit and appoint the said messuage, or tenement and premises comprised in the said settlement, and also all the estate and interest which I now possess, or to which I am entitled, of and in a certain leasehold dwelling house in the parish of purchased by me of ———, and also the leasehold messuage or tenement purchased by me from the executors of the late ——— esquire and adjoining to the

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Declaration that the monies to arise by such sale shall be considered as part of the residue of his personal estate.

Receipts of trustees to be effectual discharges to purchasers.

Confirmation thereof and subject to the estate of ——— testator's wife.

Bequest of the premises therein comprised, and also of all other leasehold premises in ——.

No. 7. first-mentioned messuage and premises, all which said several hereinbefore mentioned leasehold messuages, or tenements and premises are partly in the occupation of myself and the said —— and ——, and are used by us in the trade or business of ——, with their and every of their rights, members, and appurtenances, and also all other my leasehold premises in —— aforesaid, and all my estate, interest, and terms of years therein respectively, unto the said X., Y., Z., their executors, administrators and assigns, upon the several trusts, for the intents and purposes, and subject to the several provisos and declarations hereinafter expressed, (that is to say) in trust that they the said X., Y., Z., or the survivors or survivor of them, his executors or administrators, shall and do let, demise and manage the same in such manner as they or he, with the consent of my said wife during her life, and afterwards at their or his discretion, shall deem most advantageous; and, after deducting the rent, taxes, repairs and other outgoings for or on account of my said leasehold messuage, or tenements and premises, do and shall pay the clear residue or surplus of the rents, issues and profits thereof respectively, as the same shall become due and payable, and be received, unto my said wife M. S. and her assigns, for and during the term of her natural life, or unto such person or persons as she shall from time to time, by writing under her hand, appoint to receive the same; to the end that the same may be for her sole and separate use and benefit, and not subject to the control, debts and engagements of any husband with whom she may intermarry; and my will is, that the receipts of my said wife, under her hand, notwithstanding any coverture, shall be the only effectual discharges for the same: and from and after the decease of my said wife, upon trust, to assign and transfer the said leasehold messuages, tenements and premises, with the appurtenances, unto the eldest of my said sons, who shall be living at the decease of my said wife, M., his executors, administrators and assigns, for the residue which shall be then unexpired, of the several terms of years for which the same respectively are held. I give and bequeath to my said wife M. S., all the household and other furniture, goods, chattels and effects, which shall be in and

To trustees upon trust,

To demise and manage the same in the most advantageous way, and to pay the clear rents to M. S. for her life, for her separate use.

Bequest to testator's wife of the household

about my said messuage, or dwelling-house and premises at V——, at the time of my decease; and also all such of my plate, linen, china, jewels and wearing apparel as are not hereinafter by me specifically disposed of; I also give and bequeath to my said wife M. S. the sum of 3000*l.* of lawful money of Great Britain, 500*l.*, part of which, I direct shall be paid to her within fourteen days after my decease, and the remaining 2,500*l.* within two months after my decease; I also give and bequeath to my said wife M. S., her executors and administrators, for her absolute use, my coach and a pair of my best coach horses at her election, together with all the harness, trappings and furniture belonging thereto. I give and bequeath all the household furniture and fixtures, in and about my said dwelling-house at S., and also all the wines, spirits, and other liquors which shall be in the cellars of my said last-mentioned dwelling-house, or elsewhere, at the time of my decease, unto such one of my sons or grandsons who shall become first entitled to an estate for life, or other estate in possession, in my said freehold and copyhold hereditaments hereinbefore first devised, under or by virtue of the limitations hereinbefore-mentioned, hereby directing and enjoining him to supply my dear wife with such parts thereof as she may require to stock the cellars of my said house at V. I give and bequeath to my nephew, T. S., son of my brother C. S., the silver ——, &c. &c. As to my two silver bowls, and two pair of my silver candlesticks, one silver tea urn and one silver bread basket, I give the use thereof to my said wife, M. S., for the term of her life; and from and after her decease I give and bequeath the same as follows; (that is to say,) to &c. &c. I give to my brother, I. S., an annuity of 200*l.* of lawful money of Great Britain, to be paid to him during the term of his natural life, by equal quarterly payments, and the first quarterly payment thereof to be made at the expiration of three calendar months next after my decease, and I charge the residue of my personal estate with the payment thereof. Provided nevertheless, and my will is, that the said annuity shall be paid into his proper hands, from time to time, as the same shall become due, and that the receipts of my said brother only shall be good and sufficient discharges for the

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and other furniture at V.

To the wife 3000*l.*; 500*l.* of which to be paid within 14 days after testator's decease.

And also the coach and a pair of the best coach horses, with the harness, &c.

Bequest to his son, W. S. of the household furniture in his dwelling house at S. and all wines and liquors, directing him to supply his mother with such quantities as may be necessary to furnish her cellars at V.

Sundry bequests of the articles of plate.

Bequest to J. S. of an annuity of 200*l.* during his life, to be unalienable.

No. 7. payment thereof; and my will also is, and I declare that in case my said brother shall grant, bargain, sell, transfer, assign, alien, encumber, or in any manner dispose of, or anticipate the said annuity or any part thereof, the same annuity shall thenceforth immediately cease and be void to all intents and purposes, in such manner as if the same had not been mentioned in this my will, or as if my said brother were dead; Provided also, and I declare my will to be that in case my said brother shall become bankrupt, or take the benefit of any act of parliament to be made for the relief or discharge of insolvent debtors, that then and in either of the said cases, the said annuity shall cease and be at an end, unless or until my said brother, who shall so become bankrupt or take the benefit of such insolvent act, shall or may be entitled to, or shall be in a capacity to receive the said annuity for his own private use, notwithstanding such events, or either of them, may have happened; it being my intention that the said annuity shall be for the private use and benefit of my said brother, and not be in any manner transferable to or for the use of any other person or persons; and it is my will that the said annuity shall be paid to my said brother, notwithstanding he may be indebted to me or my estate in any manner, at the time of my decease, and that such debt shall not be set off against or deducted from the said annuity.

Nevertheless the same not to affect the sum of ——*l.* hereinafter set apart for the separate use of the testator's wife.

Provided also, and I hereby declare my will to be that the said annuity shall be without prejudice to the said legacy of 5000*l.* which is hereinafter directed to be set apart for the benefit of my said wife. I give and bequeath (various pecuniary bequests;) I also give and bequeath to the said X., Y., Z., hereinafter appointed executors of this will, the sum of 100*l.* each, of like lawful money of Great Britain, as some compensation for the trouble they will have in the performance of the trusts, or otherwise in or about the execution of this my will.

Executors 100*l.* each.

To the trustees such a principal sum as will purchase 100*l.* per annum in the funds, to be purchased in their names

I give and bequeath to the said X., Y., Z., their executors, administrators and assigns, such a principal sum of money as will be sufficient to purchase at the then market price, a quantity of stock, in some or one of the public funds, the interest or dividends whereof shall amount to 100*l.* per annum, and I direct such principal sum to be invested in the purchase of such stock directly, or as

soon as conveniently may be after my decease, and to stand in their names, or in the names or name of the survivors or survivor of them, or the executors, administrators or assigns of such survivor, upon trust that they the said X., Y., Z., or the survivors or survivor of them, or the executors or administrators of such survivor do and shall, out of the interest and dividends of such stock, pay the annual sums hereinafter mentioned, to the several persons following (that is to say) to [here follow several small annuities]. And my will is, and I direct that the several annuities hereinbefore by me bequeathed and made payable out of the said 100*l.* per annum, to arise from the stock so purchased, shall be respectively paid by equal half yearly payments, and that the first of such payments shall commence and be made the next day on which the said interest and dividends shall be payable, or as near thereto as may be convenient, after the day of my decease. And further I declare my will to be that the said several annuities, hereinbefore respectively given to the said —— and ——, shall be paid to them respectively, or to such person or persons as they respectively shall, by writing under their respective hands, appoint to receive the same, to the end that the same annuities may be for their respective separate uses, and not subject to the controul, debts or engagements of the respective husbands with whom they may happen to be intermarried at the time of my decease, or at any time afterwards; and that the respective receipts of the said —— and —— for their said respective annuities, shall be the only sufficient discharges for the payment thereof respectively. I give and bequeath to ——, the sum of 800*l.* of lawful money of Great Britain, to be paid when he shall have attained the age of 21 years, at which time only it shall become a vested interest; and I do direct that in the mean time the same shall be invested in some or one of the parliamentary stocks or funds, and the interest thereof applied towards his maintenance and education. I bequeath to such of my friends as my executors shall think proper, not exceeding —— in number, a ring of the value of ——. I give and bequeath to each of my servants who shall be living with me at the time of my decease, suitable mourning, at the discretion of my executors. And as to all the rest, resi-

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and to be applied in payment of the following annuities, viz.

Direction that the annuities given to — and —, should be for their separate uses.

The residue of his

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personal estate he bequeaths to trustees upon trust to sell and convert the same into money, and to invest such money in real or government securities, or in the public stocks, after paying thereout in the first place the said sum of ——*l.* mentioned to have been borrowed of the trustees of the settlement; and also all debts and funeral expences; and to be possessed thereof upon the trusts afterwards mentioned, viz. as to 4000*l.* sterling, part thereof, upon trust to pay the dividends thereof to the wife for her life, for her separate use.

due and remainder of my personal estate, I give and bequeath the same unto the said X., Y., Z., their executors, administrators and assigns, upon trust and to the intent and purpose that they the said X., Y., Z., or the survivor of them, or the executors or administrators of such survivor, shall and do sell and dispose of so much of the said residue of my personal estate as shall not consist of debts, and which shall not already be invested in real or government securities, for the best price that can be reasonably obtained for the same; and shall and do collect in such debts; and my will is, and I direct, that they, the said X., Y., Z., or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall, by and out of the monies which shall arise thereby, pay unto the said trustees of my said settlement, the said sum of ——*l.* hereinbefore mentioned to have been advanced by them for my use, or so much thereof only (if any) as shall remain unpaid at the time of my decease, and do and shall place out and invest the residue of such monies, after paying thereout my debts, funeral, and testamentary charges and expences, and the legacies hereinbefore bequeathed, in or upon some of the parliamentary stocks or funds, or on real securities in England at interest, and do and shall vary, alter, or transpose such stocks, funds, or securities, for others of the like nature, when, and so often as it shall seem meet, and do and shall stand, and be possessed of, and interested in, the said principal monies, stocks, funds, and securities upon the trusts, and to and for the intents and purposes hereinafter declared or expressed, concerning the same, (that is to say) as to and concerning the sum of 6000*l.* sterling money, part thereof, or the stocks, funds, or securities, in or upon which so much of the said monies shall be invested, upon trust that they, the said X., Y., Z., or the survivors or survivor of them, his executors or administrators shall and do pay, apply, and dispose of the interest, dividends, and yearly proceeds thereof, unto such person or persons only, and for such intents and purposes only, as my said wife, M. S. shall, from time to time, direct or, appoint, by writing under her hand, notwithstanding any coverture she may be under, and in default of, and until such direction or appointment, shall and do pay

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the same, or so much, whereof she shall, from time to time make no such appointment into her proper hands, for her sole and separate use and benefit, during the term of her natural life, independent of the controul, debts, or engagements of any husband with whom she may intermarry; and my will is that her receipt or receipts under her hand, notwithstanding any such coverture, shall be the only sufficient discharge and discharges for the payment thereof: and from and after the decease of my said wife, upon trust, that they, the said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor shall and do pay, transfer, or assign the same unto such of my children by my said wife, M. S., whether born in my life-time, or in due time after my decease, in such shares and proportions, (or the whole to an only child,) and for such estate and interest, and in such manner and form, and payable or transferable at such time or times, and subject to such limitations and directions as are hereinafter mentioned, expressed, and declared of and concerning the residue of such principal monies, stocks, funds, and securities; and as to and concerning the residue of the said principal monies, stocks, funds, and securities upon trust, that they, the said trustees or the survivors or survivor of them, or the executors or administrators of such survivor, shall and do pay, transfer, or assign the same unto, and amongst all and every my child and children by the said M. S. my wife, whether born in my life-time, or in due time after my decease, if but one, the whole to such one child, but if more than one, then the same to be divided and distributed between and amongst them, in the proportions and manner following, that is to say, to each of my daughters a proportion of one eighth part of such residue of the said principal monies, stocks, funds, and securities, and the residue and remainder thereof, between and amongst my sons, in equal shares and proportions, share and share alike, the share and shares of such of them as being a son or sons shall have attained the age of 21 years, or being a daughter or daughters, shall have attained that age, or shall have been married in my life-time, with my consent, to be assigned and transferred to him, her, or them respectively, as soon as conveniently may be after my decease, and the

Upon trust to be applied in the same manner as is afterwards directed, concerning the residue thereof, viz.

As to the residue of such monies and funds, upon trust to assign the same to and amongst all the children of testator by the said M. S., in the proportions following, viz. to each of the daughters one 8th part, remainder to be equally divided amongst the sons; and to be assigned to sons at 21, and daugh-

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or marriage, if those events shall happen after his decease; but otherwise as soon as convenient after his decease.

share or shares of such of them as being a son or sons shall be then under the age of 21 years, to him or them respectively, upon his or their respectively attaining such age, and the share or shares of such of them as being a daughter or daughters shall be then under the age of 21 years, and shall not have been married with such consent as aforesaid, upon her or their attaining the said age, or as soon after as circumstances will permit, the same to be considered as a vested and transmissible interest, or vested and transmissible interests in such son or sons, upon his and their attaining the age of 21 years, and in such daughter or daughters, upon her or their attaining that age, or being married as aforesaid.

In case any of the children shall be dead before attaining 21, (or being married, if daughters) the shares of those so dying, to accrue to the survivors.

And if any such child or children, being a son or sons, shall depart this life under the age of 21 years, or being a daughter or daughters, shall depart this life under that age, and without having been married with such consent as aforesaid, then all and every the share and shares of him, her, or them respectively, so dying, shall accrue, and go to the survivors or survivor, or others, or other of my said children, as is hereinbefore directed with respect to their original shares, if more than one, and the same respectively shall become vested and payable, or transferable at such ages, days, and times, as their, his, or her original share or shares shall respectively become vested and payable, or transferable, as aforesaid, and shall, together with the original share or shares, until such ages, days, and times respectively, be subject to a similar chance and condition of accruer and survivorship.

Power for the trustees to advance 1-third of the children's expectant shares for their respective maintenance, and otherwise for their benefit.

Provided also, and my will and meaning is, and I do hereby further declare, that it shall and may be lawful to and for the said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, at any time after my decease, with the consent in writing of my said wife, M. S., in case she shall be then living, and afterwards at and by their or his own discretion and authority, to pay and apply any part of the rents and profits of my estates, but without prejudice to the provision hereinbefore made for my said wife, or any of the annuities or legacies hereinbefore granted and bequeathed, and of the said residue of the said trust monies, stocks, funds, or securities, in placing of any of my said

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children in any profession, trade, business, or employment, or for his, her, or their maintenance or education, or reasonable advancement and preferment in the world, or for or upon any other just or necessary occasion, notwithstanding his, her, or their estate, interest, share, or respective shares, shall not then have become vested, due, or payable, not exceeding a third of the amount of his or her presumptive or expectant interest or share, under this my will.

Proviso that testator's wife, whilst unmarried, shall have the care of the children, during their minorities, and have a competent allowance out of the dividends for that purpose.

Provided also, and I do hereby declare, that my said wife, M. S., shall, (whilst she shall think fit, and continue unmarried,) have the care, management, and bringing up of my sons during their respective minorities, or of my daughters during their minorities, or until they shall be married with such consent and approbation as aforesaid, and for that purpose, that she, my said wife, shall have, receive, and be allowed such yearly sum or allowance out of the interest and dividends of such children's expectant shares of the said trust monies, as they, my said trustees, or the survivors or survivor of them, their, or his executors, administrators, or assigns shall, in their or his discretion, think fit or sufficient, any thing herein contained to the contrary thereof in any wise notwithstanding; and upon this further trust, that in case there shall not be any child or children of my body by the said M. S., living at my death, or there being such child or children, they shall all be dead before any of the said shares shall have become vested by virtue of the above dispositions, or any of them, then, and in such case, I do hereby will and direct that they, the said trustees, or the survivors or survivor of them, their, or his executors or administrators shall and do stand possessed and interested of and in the said residue of the said principal monies, stocks, funds, and securities, (subject to the trusts aforesaid, or such of them as shall then be unexecuted, and capable of being carried into execution,) in trust to raise and pay thereout to each and every of the children of my brother, J. S., who shall then be living, the sum of 500*l.* of lawful money of Great Britain, and as to the remainder of such residue of the said trust monies, stocks, funds, and securities, in trust for the only benefit of my brothers, ———, and ———, their

In case of none such children living to become entitled, then,

Upon trust to pay to each of his brother, J. S.'s children the sum of 500*l.* and to assign the residue unto his surviving brothers, in equal shares.

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In case any of his brothers shall die without becoming entitled to such shares that then the shares of those so dying shall go to their children.

respective executors and administrators, and to be assigned and transferred to between and amongst them in equal shares, share and share alike. Provided nevertheless, and my will is, and I do hereby declare, that in case any of them, my said brothers, shall depart this life before such last event shall happen, leaving any child or children of his body him surviving, who shall be then living, then and in such case the child or children of such of them, my said brothers, so dying, shall thereupon become entitled to such part or share of the residue of the said trust monies, stocks, funds, securities and premises, as the parent or parents of such child or children respectively, would have been intitled to have received under, or by virtue of the trusts aforesaid, in case he had been then living. And my will also is, and I do direct, that in case any, or either of them, my said brothers, shall be dead at the time of such decease and failure of the last of my issue, without leaving any such child or children of his body him surviving, who shall be then living, that then, and in such case, the part or share, and parts or shares of him or them so dying, shall go, accrue, and belong unto the survivors or survivor, and others or other of them, my said brothers, and shall be equally divided between or amongst them, if more than one, share and share alike, and if but one, then the whole of the residue to such one survivor, his executors, administrators and assigns absolutely; any thing hereinbefore contained to the contrary thereof in any wise notwithstanding. Provided always, and I do hereby declare, that the provisions hereby made to or in trust for my said wife, are so made in lieu of, and in full satisfaction for her dower, thirds, and all other claims of, in, to, upon, or out of all or any of my estates or property. And I do further declare, that such provisions are so made and intended for her own sole and separate use, benefit, and disposal, and that the same, or any part thereof, shall in no wise be subject to the controul, debts, engagements, or incumbrances of any future husband of her, my said wife, and that her receipts, notwithstanding her future coverture, shall be sufficient discharges for the same. Provided also, and I do hereby likewise declare, that such pro-

That the provisions hereby made for the benefit of Mrs. —, are in lieu of all dower, and other claims out of his estate and property, and for her sole and separate use.

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visions are also made on the express condition that she, my said wife, shall, within one month from the time of my decease, acquit, release, and discharge my said executors, and my estate, of and from all arrears of interest, dividends and profits, which may have accrued due in my life-time, on the sum of ——*l.* the interests dividends and profits whereof are settled to her separate use, by our settlement made previous to our marriage, or the interests and dividends of the funds in which the same, or the produce thereof, may have been invested, and all claims and demands in respect thereof, which said trust monies were sometime past invested by the said trustees, under the said settlement, together with other monies of my own, in the purchase of, &c. Provided always, and my will and meaning is, and I do hereby declare, that it shall and may be lawful to and for the said trustees and the survivors and survivor of them, his executors and administrators, in the mean time, from and after my decease, and until the trusts hereinbefore declared of and concerning the said trust monies, stocks, funds, securities and premises, shall be fully executed and performed, with the consent of my said wife, M. S., during her life, to be testified in writing, under her hand, and from and after her decease, then by and of the proper authority of them, the said trustees, or the survivors or survivor of them, his executors or administrators, to sell and dispose of all or any of the stocks, funds, or securities, in or upon which all, or any part of the said trust monies shall be invested, and also with such consent testified as aforesaid, or by and of such proper authority as aforesaid, as the case shall happen, to lend, and place out the monies to arise by or from such sale or disposition, or any part thereof, in or upon any other of the public or parliamentary stocks or funds, or upon real or government securities, or to deposit the same for safe custody in the Bank of England, but subject to, and so as not in any manner to affect or prejudice the trusts aforesaid, or any of them, and so from time to time to alter, change, or call in all or any such last mentioned stocks, funds, or securities, as often as they shall think fit, with such consent testified as aforesaid, or by and of such proper authority to be exercised in such event as aforesaid,

Power for the trustees to vary and alter the securities.

No. 7.

Power to grant leases of the freeholds, and of the copyholds, with licence for any term, not exceeding 21, so as the most improved rent be reserved without taking any fine, &c.

subject, and without prejudice as aforesaid. Provided always, and I hereby declare my will to be, that it shall and may be lawful to and for the person or persons who, by virtue of the dispositions hereinbefore contained, or any of them, shall be in the actual possession of the said messuages, lands, and hereditaments, from and after he or they shall have attained the age of 21 years, and in the mean time, until he or they shall have attained that age, then for his or their guardian or guardians, by indenture or indentures, to be by him or them respectively duly executed, under his or their hand and seal, or respective hands and seals, to demise, lease, and grant all or any part of the said freehold premises, and by indenture, surrender, or otherwise to lease such of the said premises as are of copyhold or customary tenure, (so far as the licence of the lord or lords of the manor or manors, whereof the same respectively is or are parcel, or held, can be obtained for that purpose, or the custom of such manor or manors will respectively admit of,) unto any person or persons, for any term or number of years, not exceeding 21 years from the making thereof, so as there be reserved upon every such lease the best and most improved yearly rent or rents that can be reasonably obtained for the premises thereby leased, without taking any fine, premium, foregift, or forfeiture, for making the same, or any of them, and so as in every such lease there be contained a clause of re-entry for the non-payment of the rent or rents, thereby reserved, and so as the lessee in every such lease shall and do execute a counterpart thereof. Provided always, and I do hereby direct and declare, that if the said trustees or any of them, or any future trustees or trustee, under, or for the purposes of this my will, shall die, or desire to be discharged from, or shall refuse to act, or become incapable of acting in the trusts of this my will, at any time or times, before such trusts shall be fully performed and executed, it shall be lawful for the trustees or trustee for the time being, with the consent and approbation of the person or persons, for the time being, in the actual possession or receipt of, or immediately interested in, and entitled to the rents and profits of the said hereditaments and premises hereinbe-

Power for the appointment of new trustees.

No. 7.

fore devised and bequeathed, signified in writing, under his or their hand or hands, or in case the person or persons so interested and entitled, shall be a minor or minors, then with the consent and approbation of his, her, or their guardian, or guardians, signified in like manner, to nominate and appoint any other fit person or persons to be a trustee or trustees in the place and stead of him or them respectively, so dying, or desiring to be discharged from, or refusing to act, or becoming incapable of acting in the said trusts, and so in like manner, from time to time, as often as there shall be occasion, upon the death of any succeeding or future trustee or trustees, or his or their desire to be discharged from or refusing to act, or becoming incapable of acting in the said trusts; and that when and so often as any such new trustee or trustees shall be so nominated or appointed as aforesaid, the old trustee or trustees shall convey and assign the trust estates, and premises then in him or them vested, for all his or their estate and interest therein, so and in such manner as that the same may become, and be legally and effectually vested in the surviving or continuing trustees or trustee, and such new trustee or trustees jointly, or in such new trustee, or trustees, only, as the case shall happen, to the uses, upon the trusts, and to and for the intents and purposes, and under and subject to the provisos, declarations, and directions hereinbefore declared or expressed of or concerning the same, or such of them as shall be then subsisting, or capable of taking effect, and such new trustee or trustees shall and may act in the execution of the said trusts in such and the same manner, to all intents and purposes, and shall be invested with, and have such and the like powers and authorities, as if he or they had been originally named a trustee or trustees for such purposes by this my will. And I hereby nominate and appoint the said X., Y., Z., executors of this my will. And I also appoint them, and also my said wife (so long as she shall remain unmarried,) guardians of the persons and estates of my children during their minorities. And I direct and declare that the said X., Y., Z., or any of them, or any new trustee or trustees, who shall be nominated and appointed as aforesaid, or the heirs, executors or administrators of either or

Appointment of executors and guardians of the children.

Usual clause for indemnifying the trustees.

No. 8. any of them, shall not be answerable or accountable by virtue of, or under the trusts hereby reposed, or in pursuance hereof to be reposed in them respectively, any otherwise than each person, for his own actual receipts, acts, neglects and wilful defaults; and that they, or either or any of them, shall and may, by or out of any monies which shall come to their hands respectively by virtue of this my will, defray and retain to and reimburse themselves and each other, all such costs, charges and expences as they respectively shall or may incur, pay or sustain, in or about the execution, or by means of the trusts hereby in them reposed; and I hereby revoke all former wills and codicils thereto by me made at any time heretofore, and declare this only to be my last will, as expressed and contained in this and the six preceding sheets of paper hereto annexed.

Revocation of all former wills.

In witness, &c.

No. 8.

Will consisting exclusively of Provisions for Wife and younger Children, by annuity, and portions charged upon all the Testator's property.

Testator gives his house at — after his wife's death, and all other his freehold, leasehold, and copyhold, immediately on his

THIS is the last will and testament of me, J. H., of, &c. I give and devise all that my freehold messuage or dwelling-house, known by the name of S——, and all my estate and lands thereunto belonging or therewith occupied, situate at ——, unto my said wife, for and during the term of her natural life; and from and immediately after her decease I give and devise my said messuage or dwelling-house, estate and lands at ——, and from and immediately after my

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decease, I give and devise all other my freehold and all my copyhold or customary and leasehold messuages, lands, tenements and hereditaments whatsoever and wheresoever, and all my equitable and other estate and interest in the contracts which I have entered into for the purchase of land-tax charged upon and payable for my said estate; and also all shares and promissory notes, in or from the Grand Junction Canal navigation, of which I shall be possessed at my death; and all the share or shares, estate and interest which I have of and in the trade or business of ——, which I now carry on in partnership with —— and ——, and all my books, pictures, plate, linen, china, household goods and household furniture of every kind which shall be in or about both my dwelling-houses, the usual places of my residence in town and country, at the time of my decease; and also all my stocks, monies, securities for money, and all other my personal estate not hereinbefore disposed of, unto and to the use of my said son, J. H., T. O., and W. R., their heirs, executors, administrators and assigns respectively, for all such estate, term and interest as I shall have therein respectively, at my decease, and according to the several natures and qualities of such estates and property respectively, upon the trusts hereinafter mentioned, expressed and declared of and concerning the same, (that is to say,) as for and concerning the books, pictures, plate, linen, china, household goods, and household furniture of every kind, which shall be in both my said dwelling-houses, the usual places of my residence in town and country, at the time of my decease, upon trust, from and after my decease, to allow my said wife to have and enjoy the use thereof during her life, for her own absolute benefit, without any controul whatsoever; and my will is, and I do hereby order and direct that as soon as conveniently may be after my decease, my said trustees do cause a true and exact inventory to be made and taken of all the said books, pictures, plate, linen, china, household goods and household furniture, and two copies to be made of such inventory, one to be delivered to my said wife, and the other to be kept by my said trustees, which last copy shall be signed by my said wife, at the foot of a receipt

decease, his contracts for land-tax, and canal shares, partnership share in his business of a — books, pictures, plate, linen, china, household goods, and also his stocks, money, securities for money, and all other his personal estate to his trustees upon trust,

to allow his wife to have the use of the books, furniture, &c. for her life, with directions for an inventory,

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Trustees out of the devised premises to raise 8000*l.* for children's portions (except the eldest son).

thereunder written, for the articles therein specified, at or before the time of her taking possession thereof; and I declare and direct that my said sons, J. H., T. O., and W. R., their heirs, executors, administrators and assigns shall stand and be seised and possessed of and interested in my said estate at ——, and the said books, pictures, plate, linen, china, household goods and household furniture, subject to the life estate and interest of my said wife therein, and all other my said freehold, copyhold and leasehold estates, shares and notes in the Grand Junction Canal navigation, and personal estate whatsoever hereinbefore devised and bequeathed to them upon trust, by and out of the rents and annual income of my said freehold, copyhold and leasehold estates, or by mortgage and sale thereof, or of any part thereof, or by all or any of the same means, or by and out of the annual produce of my said personal estate, or by sale or other disposition thereof, or of any part thereof, or by such other ways and means as they shall think fit and advisable, to raise and levy the sum of 8000*l.* for the benefit and for the portions of all and every my child and children, living at my decease, or born afterwards (other than and except my eldest son the said J. H.) equally to be divided between and amongst, or for the benefit of them, if more than one, share and share alike, and if there shall be but one such child, then for the benefit of such only child, and to be raised and paid to or for such children or child, in the manner following, (that is to say) the share or respective shares of such of them, as being a daughter or daughters, shall be under the age of 21 years, and unmarried at the time of my decease, to be raised and paid as and when she or they shall respectively attain that age or marry with the consent of, &c. hereinafter named, which shall first happen and to be paid or invested in manner hereinafter mentioned, to the intent that the income thereof may be for the sole and separate use of such daughter or daughters, and may not be subject to the debts, control or engagements of any person, with whom she or they may, after my decease, happen to intermarry, and that the principal may be subject to the respective testamentary appointments, as hereinafter is men-

tioned; and the share or respective shares of such of them respectively, as being a son or sons, shall be under the age of 21 years, at my decease, to be raised and paid as and when he or they respectively shall attain that age; unless such time or respective times of marriage or attaining such age shall happen in my life-time, and in such case the share or shares of such of them as being a daughter or daughters shall attain the age of 21 years, or marry during my life-time; or being a son or sons, shall attain the age of 21 years, during my life, shall be as a vested interest for his, her, or their benefit respectively, upon my decease, and be raised and payable in manner aforesaid, at the end of six calendar months next after my decease, with interest thereon from my decease, until actual payment thereof; and if any such child or children, being a daughter or daughters, shall die under the age of 21 years, and without having been married, or being a son or sons, shall die under that age, then, as well the original as every other share which he, she or they, so dying, shall have taken by way of survivorship or accruer, shall go and be raised and paid and payable to or for the benefit of the survivor and survivors, and others or other of them, together with my eldest son, at such time or times as his, her or their original share or shares shall become payable, or as soon afterwards as circumstances will permit, but so that in making such division of all such surviving or accruing shares, my eldest son and his executors or administrators shall be included, and shall have and be entitled to one equal share and proportion therein with the other children or their respective executors or administrators; and it is my will and mind, and I do hereby declare that all and every the share or shares so directed to survive and accrue, shall from time to time survive and accrue, together with the original share and shares, until such original share or shares shall, by virtue of this my will become payable; and in case there shall be no such child or children, who, being a daughter or daughters, shall live to attain the age of 21 years, or be married, or being a younger son or sons shall attain the age of 21 years, then my will and mind is, and I do hereby direct that the said sum of 8000*l.* or any

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Clause of survivorship including the eldest son.

If children all die before the vesting of their shares, money not to be raised.

No. 8. part thereof, shall not be raised, and that the said trusts hereinbefore contained in that behalf shall cease and determine, and all and every part of my real and personal estate, be as fully and effectually discharged therefrom as if the same trusts had never been declared. And subject to the several trusts hereinbefore declared, I direct that my said sons, J. H., T. O. and W. R., their heirs, executors, administrators and assigns shall stand seised and be possessed of and interested in my said real estate, and my said residuary personal estate, upon trust, by and out of the rents, issues and annual produce thereof, or by mortgage, sale, or other disposition thereof, or of any part thereof, or by all or any of the same means, or by such other way and means as they shall think fit and most advisable, to raise and levy yearly and every year one annuity or yearly sum of 365*l.* free from taxes, and clear of all other deductions whatsoever, and pay the same into the proper hands of my said wife, or into the hands of such person or persons as she, by any note or writing under her hand shall, from time to time, but not by way of anticipation, charge or assignment, appoint to receive the same during her life, to the intent that the same may be for the sole and separate use of my said wife, and may not be subject to the debts, control, disposition or engagement of any person with whom she may happen to intermarry, the same annuity to be paid and payable by four equal quarterly payments, on four days or times in every year, the first quarterly payment thereof to begin and be made at the end of three calendar months next after my decease. And upon further trust, that they my said trustees respectively do and shall by all or any of the ways and means aforesaid, raise, levy and pay to the executors or administrators of my said wife, a proportionable part of the said annuity of 365*l.* calculated to the day of the decease of my said wife, for and in respect of the incurring quarter of a year, wherein she my said wife may happen to die. And I further direct that the receipt or receipts of my said wife, or of her appointee or appointees, and her or their receipt or receipts only shall be a good and sufficient discharge, or discharges, to the person or persons paying the said annuity, for so much thereof as in such

Annuity to the wife.

receipt or receipts shall be acknowledged or expressed to be received; and subject to the trusts hereinbefore declared for my said wife's benefit during her life, and subject to the payment of the said sum of 8000*l.* thereinbefore directed to be raised for portions for my younger children, and to every estate, trust, and interest hereinbefore mentioned, and all powers, provisos, and directions in this my will contained respecting my said real estate, and my said residuary personal estate, I declare and direct that my said son J. H., T. O. and W. R. their heirs, executors, administrators and assigns respectively shall stand seised, and be possessed of, and interested in all my said real and all my said residuary personal estate whatsoever in trust to pay to, or permit and suffer, or well and sufficiently to authorise and empower my said son J. H. and his assigns to receive and take the interest dividends and annual produce, and the rents, issues, and annual income of the same real and personal estate for and during the term of his natural life and from and after his decease, in trust for all and every or such one or more of the children of my said son J. H. lawfully to be begotten, whether born in his lifetime or after his decease at such time or times and in such parts shares and proportions, and subject to such conditions, restrictions and limitations over to or for the benefit of all or any of such children as he my said son J. H. from time to time by any deed or deeds writing or writings with or without power of revocation to be by him sealed and delivered in the presence of and to be attested by two or more credible witnesses or by his last will and testament in writing, or any codicil or codicils thereto, or any writing purporting to be his last will and testament or codicil to be signed and published by him in the presence of and to be attested by three credible witnesses, shall direct or appoint; and in default of and in the mean time and until such direction or appointment shall be made, and as to so much and such part or parts thereof, whereof no such direction or appointment shall happen to be made, and also subject to such direction or appointment where the same shall happen not to be a complete and entire appointment of the whole interest and property therein, as to for and concerning all my said freehold, copyhold and leasehold messuages, lands, tene-

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And subject to the aforesaid payments in trust to pay to testator's son, J. H., all the rents, profits, and annual produce of the real and personal estates for his life, and after his decease, in trust for his children according to his appointment.

And in default of appointment, then as to the messuages, lands and tenements to and amongst the children of J. H., in equal

No. 8. ments and hereditaments, in trust for all and every the child and children of my said son J. H. lawfully to be begotten in equal shares, if more than one, as tenants in common and not as joint tenants, and for their respective heirs, executors, and administrators for ever; and if any such child or children shall die under the age of 21 years, then as well the original share of him her or them so dying, as all such other share or shares as shall survive to him her or them on the death of any others or other of the said children under the said age of 21 years shall be in trust for the survivors or survivor and others or other of them in equal shares if more than one as tenants in common, and not as joint tenants, and for their respective heirs, executors, administrators and assigns for ever; and in case there shall be no child or children of my said son J. H. or being such, all of them shall die under the age of 21 years, then my said freehold, copyhold, and leasehold messuages, lands, tenements, and hereditaments, or so much thereof whereof there shall have been no such direction or appointment as aforesaid, shall be in trust for all and every my said daughters and younger sons and other child and children begotten or to be begotten, and whether born in my life-time or after my decease in equal shares if more than one, as tenants in common, and not as joint tenants, and for their respective heirs, executors, administrators and assigns for ever; and if any such child or children shall die under the age of 21 years, then as well the original share of him her or them so dying, as all such other share or shares as shall survive to him her or them on the death of any others or other of the same children under the said age of 21 years shall be in trust for the survivors or survivor and others or other of them in equal shares if more than one, as tenants in common, and not as joint tenants, and for their respective heirs, executors, administrators and assigns; and from and after the death of my said son J. H. as to for and concerning all and singular my monies, stocks, funds, securities, and residuary personal estate whatsoever subject as aforesaid, in trust for all and every the child and children of my said son J. H. lawfully to be begotten equally to be divided between and amongst them if more than one, share and share alike, and if there shall be but one such child then for such

proportions with survivorship.

And in default of such children of testator's son, J. H., then to and amongst testator's younger children in equal shares, with survivorship.

And as to the monies, stocks, and residuary personal estate to and amongst the children of J. H. equally, with survivorship.

only child, and if any such child or children being a daughter or daughters shall die under the age of 21 years and without having been married, or being a son or sons shall die under that age, then the part or share parts or shares of him her or them so dying, shall go and be transferred to the survivors or survivor of them and the executors, administrators and assigns of such of them being dead, who being a daughter or daughters shall have attained the age of 21 years, or been married, or being a son or sons, shall have attained the age of 21 years, at such time or times as his her or their original share or shares shall become transferable or as soon afterwards as circumstances will permit; and my mind is, and I declare that all and every the share or shares so directed to survive and accrue shall from time to time survive and accrue together with the original share and shares until such original share and shares shall by virtue of this my will become vested; and in case there shall be no such child or children of my said son J. H. who being a daughter or daughters shall attain the age of 21 years, or be married, or being a son or sons shall attain the age of 21 years, then my will and mind is, and I do hereby declare that my said trustees and their executors, administrators and assigns shall stand and be possessed of and interested in all and singular the same monies, stocks, funds, securities, and residuary personal estate whatsoever upon the same trusts and to and for the same ends, intents, and purposes as are hereinbefore expressed and directed concerning the said sum of 8000*l.* directed to be raised as portions for my said daughters and younger sons as aforesaid or such of them as shall be then subsisting and capable of taking effect and to be payable and transferable for the sole benefit and separate use of my daughters in like manner as their said portions in the said sum of 8000*l.*; provided always, and my will is, and I do hereby direct that in case my said son J. H. or his assigns shall punctually pay the said sum of 8000*l.* as portions for my younger children when and as the same portions shall respectively become payable under the directions of this my will, and every part thereof, and the interest monies hereinafter directed to be paid in respect of the same, and also the said annuity of 365*l.* to my said wife for her life and every part

And in default of such children of J.H. then to and amongst testator's younger children, in like manner as the 8000*l.* was directed to go and be divided.

No. 8. thereof at the times and in the manner hereinbefore mentioned, and until default shall be made in some of the same payments, the trustees for the time being of this my will shall from time to time, and at all times permit and suffer or allow my said son J. H. and his assigns during his life to receive and take the rents, issues, and annual produce and income of my said real and personal estate, and of every part thereof (subject as hereinbefore mentioned) to and for his and their own absolute use and benefit without any hindrance, interruption, or disturbance whatsoever; and in case my said son J. H. shall with his own monies pay or advance the whole or any part of the principal of the said sum of 8000*l.* then and in such case, and to that extent he shall be and remain a creditor upon the real and personal fund hereinbefore made liable to the raising and payment thereof, and he or his executors, administrators or assigns shall and may have the amount of the principal so to be advanced by him raised and levied by the ways and means aforesaid by and out of the said real and personal fund to and for his and their own use and benefit together with interest thereof from the time of his death, if the same shall not have been before raised after the rate of 5*l.* per centum per annum; Provided also, and I direct that from and after my decease, interest money at the rate of 3 pounds for one hundred pounds for a year upon such of the respective portions of my said daughters and younger sons of and in the said sum of 8000*l.* thereinbefore provided for them as shall not at the time of my decease be payable by virtue of this my will shall be paid by my said son J. H. or his assigns during his life, and after his death by the person or persons entitled to the fund subjected to the payment thereof, and in default of the regular payment thereof, shall be raised and paid by the said trustees for the time being, by and out of the rents, issues, and annual produce of my said real and personal estate, or by mortgage, sale, or other disposition of the whole or a sufficient part thereof until the same portions shall respectively become payable under the directions of this my will, or until the death of my said wife, which of the events shall first happen, the same interest money or a sufficient part thereof to be paid into the hands of my said wife for the maintenance,

Testator's son, J. H., to enjoy the produce of the estates, on his paying the above charges and sums.

Such son, upon his paying the 8000*l.* to become a creditor to the estate for the same.

Interest to be 3 per cent. upon the portions.

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education, and support of such of my said daughters and younger sons to whom the same portions shall belong during the term of her natural life, and from and after the decease of my said wife, interest after the rate of 5*l.* for one hundred pounds for a year upon such of the same respective portions as well original as accruing, as shall not at my death be payable shall be paid by my said son J. H. or his assigns during his life, and after his death by such other person or persons as aforesaid, and in default of such payment by my son or such person or persons as aforesaid, the same shall be raised and paid by the trustees for the time being of this my will by the means aforesaid until the same portions shall respectively become payable; and the whole, or a sufficient part thereof shall be applied by the same trustees for the maintenance, education, and support of such of my said daughters and younger sons respectively to whom the same portions shall belong. And I direct that the residue (if any) of such interest money after maintaining and educating my said daughters and younger sons as well during the life of my said wife as afterwards, and until their said portions shall respectively become payable in manner aforesaid, shall be placed out or invested in or upon government or real securities, from time to time to accumulate, and such accumulation shall go along with the principal portions from whence the same shall arise. And it is my will and I hereby declare and direct that it shall and may be lawful for the major part of the trustees of this my will for the time being, when and so often as they shall think necessary, to raise and advance by and out of the rents, issues, and annual produce and income of my said real and personal estate, or by mortgage or sale thereof, or by all or any of the same ways and means, or by such other ways and means as they shall think proper, any sum or sums of money for the purpose of apprenticing, placing out, or other advancement of any one or more of my said younger sons during his or their minority, not exceeding the sum of 300*l.* for each son, the same sum and sums of money to be taken and considered as and in part of the portion or share or respective portions or shares, as well original as accruing, of such son and sons for whom the same monies shall be so advanced, of and in the said sum of 8000*l.* herein-

Interest on the portions till payable

To be applied for maintenance, &c.

The residue to accumulate.

Part of the portions to be applied, if necessary, in and towards the advancement in the world of any of the younger children.

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The portions of the daughters to be for their separate use, and not to be charged or anticipated by them.

before directed to be raised for the benefit of my daughters and younger sons as aforesaid, and I direct that my said trustees and their executors, administrators and assigns shall stand and be possessed of and interested in such portion or portions, as well original as accruing, as is or are hereinbefore provided for such of my younger children as shall be a daughter or daughters by and out of the said sum of 8000*l.* when and as the same shall be paid and payable, upon trust to place out or invest such sum or sums of money in or upon government or real securities at interest and from time to time to alter vary and transpose such securities and funds, and to stand and be possessed of and interested in the money so to be placed out in trust to pay the interest, dividends, and annual produce thereof into the proper hands of such daughter or daughters according to her or their share or respective shares and interests therein, or into the hands of such person or persons as she or they by any note or writing under her or their hand or hands shall from time to time, but not by way of anticipation, charge, or assignment, appoint to receive the same, during the life or respective lives of such daughter or daughters, to the intent that the same may be for her or their sole and separate use, and may not be subject to the debts, controul, disposition, or engagements of any present or future husband or husbands of such daughter or daughters, and from and after the decease of such daughter or daughters respectively upon such trusts and to and for such intents and purposes, and under and subject to such powers, provisos, and declarations as such daughter or daughters respectively, notwithstanding her or their coverture, by her or their will or respective wills, or any writing or writings purporting to be such will or wills, or any codicil or codicils to be signed and published in the presence of, and to be attested by two or more credible witnesses, shall direct or appoint; and in default of, and in the mean time, until some such direction or appointment shall be made, and as to so much, and such part or parts thereof, whereof no such direction or appointment shall be made, or where the same shall not be a complete and entire appointment of the whole interest and property therein, in trust for such person or persons of the blood and kindred of such daughter or daughters living at the time of the decease of such daughter or daughters respectively, as

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would by virtue of the statutes of distribution have become entitled to the same. And my will is, and I further direct that in case my said son I. H. or his assigns shall happen to make default in payment of the portions hereinbefore provided for my younger sons and daughters, or of any part of the same, or in payment of the annuity of 365*l.* to my said wife or any other sum or sums of money herein directed to be paid, when and as the same monies shall respectively become payable by virtue of this my will, and my said trustees shall, in pursuance of my directions for that purpose given, by mortgage, sale, or other disposition of all or any part of my said real and personal estate, happen to raise and levy more money than will be sufficient to pay such sum or sums of money upon such default as aforesaid, then the residue of the money so raised and remaining in hand after application of a sufficient part thereof for the purposes of this my will, shall be placed out in or upon government or real securities at interest in the names of my said trustees, who shall stand and be possessed of such securitie supon the same trusts, and to and for the same intents and purposes, and under and subject to the same powers as are herein expressed, declared, and contained of and concerning my real and personal estate or such of them as shall be then subsisting and capable of taking effect, regard being had to the nature of the fund from whence the monies so to be invested in securities shall respectively arise.

If upon default in payment of the portions the money raised by mortgage, &c. shall be more than the sum wanted, the overplus to be invested upon the same trusts as before-mentioned concerning the settled estates.

And I do hereby authorise, empower, and direct the trustees for the time being of this my will from time to time as occasion shall require, and as they shall think proper, during the continuance of the trusts by me herein declared of and concerning my said leasehold premises, to apply for, and do their endeavours to renew the leases or respective leases of the same premises, the costs and charges of all which renewals I do hereby charge on the whole of my real and personal estate so hereby devised and bequeathed to my said trustees as aforesaid; and I order and direct that all new leases to be obtained of the same leasehold premises shall be and be declared to be on the like trusts, and subject to the like powers, provisos, and directions as are herein declared of and concerning the now subsisting lease or leases of the same premises, or such of the same trusts as shall be then subsisting. I direct

Trustees to renew leases.

Debts and funeral expences.

No. 8. that all my just debts, testamentary and funeral expences shall be paid by my executors and executrix as soon as conveniently may be after my decease; and I declare that it shall and may be lawful for my said son J. H., T. O. and W. R., and my said wife M. H. and the trustees to be appointed as hereinafter mentioned, or the major part of them for the time being, from time to time to agree and compound with any person or persons who at or after my decease shall be debtors, accountants to, or who shall appear or pretend to be creditors or demandants upon my estate and effects, or upon my trustees or executors and executrix in respect thereof, in all cases where the same in the judgment of my said trustees and executors and executrix, or the major part of them, shall seem necessary or reasonable, and to take such part as can be gotten in full discharge of all such debts, and also to give such consideration as will be accepted in full discharge of all such demands, as shall be thought most advantageous for my estate and the persons interested therein.

Power to the trustees to compound debts, &c.

Leasing power.

And my will further is, and I hereby declare that my said trustees respectively, shall from time to time and at all times have full power by indenture or indentures under their respective hands and seals, to demise, lease, and grant my said freehold, copyhold, and leasehold premises or any part or parts thereof unto any person or persons for any term or number of years not exceeding 21 years, to take effect in possession and not in reversion or by way of future interest, so as upon all such leases there be reserved to continue payable quarterly or half yearly, during the term thereby to be granted, the best and most improved yearly rent or rents that can be reasonably had or got for the same without taking any fine, premium, or foregift, and so as in all such leases there be contained conditions for re-entry for non-payment of the rent, and so as no clause be contained in any of the said leases giving power to any lessee to commit waste, and so as the respective lessees execute counterparts of all such leases, and so as the leases of the said copyhold parts of the said premises be made according to the custom or customs of the manor or manors whereof the same are holden, and the leases of the leasehold parts of the said premises be made to determine before determination of the terms or interest of my said trustees therein. Provided also, and I declare and

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Clause for changing trustees.

direct if my said son J. H. and the said T. O. and W. R. or any two of them, or two of any future trustees to be appointed as hereafter is mentioned shall die or be desirous of being discharged of and from, or refuse or decline to act or become incapable of acting in the trusts hereby in them reposed as aforesaid, before the said trusts shall be fully performed or discharged, then and in such case, and when and as often as the same shall happen, it shall and may be lawful for the trustees so declining to act, or the executors, or administrators of such of them so dying, by any writing or writings sealed and delivered by them, and to be attested by two or more credible witnesses from time to time to nominate substitute or appoint any other persons to be trustees in the stead or place of the trustees so dying or desiring to be discharged, or refusing or declining to act, or becoming incapable of acting as aforesaid, so that there be at all times three acting trustees of this my will until the trusts thereof shall be fully completed; and in default of such appointment it shall be lawful for my younger children, or any of them, in like manner to appoint such new trustees, and which I hereby direct to be done accordingly, and that my will may be strictly complied with in this my request; and I direct that when and as often as any new trustees shall be nominated and appointed as aforesaid, all the said trust estates, monies, securities, and funds shall be thereupon with all convenient speed conveyed, assigned, and transferred in such sort and manner, and so as that the same shall and may be legally and effectually vested in the surviving or continuing trustees of the same trust estates, monies, and premises, and such new trustees jointly, or if there shall be no such continuing trustees, then in such new trustees wholly, to for and upon such and the same trusts intents and purposes as are hereinbefore declared or expressed of and concerning the said trust estates, securities, monies, and premises as aforesaid, or such of them as shall be then subsisting and capable of taking effect; and that all such new trustees shall and may in all things act and assist in the management and carrying on and execution of the trusts to which they shall be so appointed, as fully and effectually, to all intents, effects, constructions, and purposes whatsoever, and shall have, and be considered as

No. 8. invested with such and the same powers and authorities as if they had been originally in and by this my will nominated trustees for the purposes for which such new trustees shall be appointed, any thing hereinbefore contained to the contrary hereof in any wise notwithstanding. And I appoint my said wife during her widowhood, guardian of all my infant children living at my death, or born afterwards, until the sons shall attain the age of 21 years and the daughters shall attain that age or be married; and after the decease or second marriage of my said wife which shall first happen, I appoint the said T. O. and W. R. and the survivors and survivor of them guardians and guardian of my said infant children as aforesaid; and I appoint my said son J. H. and the said T. O. and W. R. and my said wife executors and executrix of this my will. I give to each of them the said T. O. and W. R. the sum of 100*l.* on condition of their respectively acting in the trusts and execution of this my will but not otherwise; and I give to my said son J. H. and the said T. O. and W. R. their heirs and assigns all such real estates as are now vested in me by way of mortgage in order to enable them with the greater ease and convenience to recover, receive, and get in the money secured by such mortgages for the purposes of this my will; and I give to my said son J. H., T. O., and W. R. all such real estates as are now vested in me upon any trust or trusts, to hold the same to my said son J. H., T. O., and W. R. their heirs and assigns upon the trusts affecting the same. Provided always, and it is my will and mind, and I do hereby declare that it shall and may be lawful to and for my said son J. H., T. O. and W. R. and all future trustees to be appointed as hereinbefore mentioned, their and every of their executors and administrators, by and out of all or any of the monies which by virtue of this my will shall come to their or any of their hands, to deduct, retain to, and reimburse themselves and himself, and to pay or allow to his and their coexecutors, co-executrix, and co-trustees or co-trustee all such costs, charges, and expences as they respectively shall and may sustain, expend or be put unto, in or about the execution of this my will, or any of the trusts herein contained; and also that they and their respective executors and admi-

Devise of the mortgage and trust estates of the testator to the trustees to get in the mortgage debts, and to hold the trust estates upon the trusts affecting the same.

nistrators shall be charged and chargeable only, every of them for and with his and their own respective receipts, payments, acts, and wilful defaults, and not otherwise, and shall not be charged or chargeable with or for any sum of money other than such as shall actually and respectively come to his or their hands by virtue of this my will, nor with or for any loss or damage which may happen in or about the execution thereof, or any of the trusts hereby declared, without his or their wilful default respectively. In witness whereof I the said J. H. the elder have to this my last will and testament contained in eleven sheets of paper set my hand to the first ten sheets, and my hand and seal to this last sheet the 20th day of April in the year of our Lord 1805. No. 8.

No. 9.

A Will chiefly settling renewable leases upon collateral relations; with other dispositions of personal estate.

THIS is the last will and testament of me L. F., of —— Whereas, under the will of ———, deceased, I am entitled in expectancy, on the death of the survivor of ———, and ———, to the absolute interest of, and in divers lands, tithes, and other hereditaments, situate, lying, arising, and being in the several parishes of ———, and ———, and elsewhere in the county of ———, and held by and under certain leases for years, renewable, under the dean and chapter of ———. And whereas I am also entitled, under, and by virtue of an indenture of settlement, bearing date the 20th day of October, 1804, in the event of my surviving ———, to certain monies, stocks, funds and securities, which have arisen from the sale of ———, in the county of ———, and which are vested in the names of

No. 9.

Devise of all the personal estate to trustees.

the trustees, named and appointed in and by the said indenture of settlement. I do hereby give, devise, and bequeath all the said leasehold estates, monies, stocks, funds, securities, and premises, to which I am so entitled in reversion, or expectancy as aforesaid, and subject to the said lives and events respectively, hereinbefore mentioned, and all other my estate, property and effects, real and personal, and of what nature and kind so ever, and wheresoever situate, subject to the payment of my just debts, funeral and testamentary expences, unto and to the use of A., B., C., upon the trusts hereinafter expressed and declared of and concerning the same respectively, (that is to say) upon trust that my said trustees, and the survivors and survivor of them, his heirs, executors, or administrators, do by and out of the rents and profits of my said leasehold estates and premises, raise and lay apart such annual sum as they may deem sufficient for paying the rents, and performing the covenants reserved and contained by and in the original and subsisting leases thereof, as long as the said trusts hereby in them reposed, or any of them shall remain to be performed; and also by and out of such rents and profits of my said leasehold estates, set apart such sum of money annually, as they shall, in their judgment and discretion, deem sufficient to renew the leases of the same premises, and take new leases thereof respectively in their own names, when, and as it shall be usual and requisite, and also from time to time make such proper surrenders of the leases subsisting, as shall be requisite or necessary, or incident to such renewals, and also do and shall, by and out of the rents and profits of the said leasehold estates, and such annual, or other sums so set apart as aforesaid, pay and discharge the fines and fees which shall or may be duly demandable and payable upon such renewals, all which renewed leases shall be vested in them the said trustees, for the time being, upon the same trusts, and for the same intents and purposes, and with under and subject to the same powers, provisos, limitations and declarations, as are contained and referred to in this will, concerning the present subsisting leases, or any of them. And I do hereby also empower and direct my said trustees for the time being, during the time afore-

Out of the rents and profits to set apart a sufficient sum to pay the rents reserved on the original leases, and also the expences of the renewals.

said, out of such rents and profits of the said leasehold estates and premises as aforesaid, to discharge and defray all such expences as may be incident to, and incurred in the proper management of the said leasehold premises, or in receiving and recovering the rents thereof; and subject to such expenditure and disbursements, do and shall, out of such rents and profits of the said leasehold estate, pay and discharge the several annuities, or clear yearly sums following (that is to say) to ——, if he shall survive me, the clear yearly sum of 400*l.* for and during the term of his life; to my brother, O. F., the clear yearly sum of 300*l.* for and during his life; to ——, the clear yearly sum of 60*l.* for and during his life; to ——, the clear yearly sum of 40*l.* for and during his life; to ——, the clear yearly sum of 100*l.* for and during her life; to ——, the clear yearly sum of 50*l.* for her life: the said several annuities of 400*l.*, 300*l.*, 60*l.*, 40*l.*, 100*l.*, and 50*l.*, to be paid quarterly, by equal payments in every year, and a proportionate part of such quarterly payment (if any) as shall be accruing, and not have actually accrued due at the time of the decease of each of the said several annuitants respectively, the first payment of each of the said sums to begin and be made at the expiration of three months after my decease; and subject to the several aforesaid annuities, payments and provisions, I will and direct, that my said trustees for the time being do and shall stand and be possessed of all the said last mentioned leasehold estates and premises, so to them devised and bequeathed as aforesaid upon trust, to pay or empower my brother, M. F., and his assigns, to receive the rents and profits, interest, dividends, and annual proceeds of the same respectively, for his and their own absolute use and benefit, for aud during the term of his natural life, and from and after the decease of my said brother, M. F., do and shall stand and be possessed of and interested in the said leasehold estates and premises subject as aforesaid, in trust for the first son of my said brother, M. F., of his body lawfully begotten, his heirs, executors, administrators and assigns; but nevertheless, in case such first son shall happen to die before he shall have attained the age of 21, and without lawful issue of his body begotten, then do and shall stand and be pos-

No. 9.

And to defray the expences of management.

And subject to such payments and disbursements, to pay annuities.

To pay to or empower testator's brother to receive the rents and profits for his life.

Trusts for unborn children with executory trusts over upon their dying before 21.

No. 9. sessed of and interested in the same premises, in trust for the second son of my said brother, M. F., his heirs, executors, administrators and assigns, and in case such second son of my said brother shall happen to die before he shall have attained the said age of 21, and without lawful issue of his body begotten, then in trust for the third and every other son and sons of my said brother, M. F., in like manner successively, according to the order of their birth, with like limitations over in the event of their respectively dying before 21, and without lawful issue as aforesaid; and in case there shall be no son of my said brother, M. F., lawfully begotten, living at his death, or there being any such, they shall all die before they shall attain the age of 21, and without lawful issue as aforesaid, then in trust for all and every the daughter and daughters of the body of the said M. F., lawfully begotten, his and their heirs, executors, administrators and assigns, to be equally divided between and among them, if more than one, as tenants in common, and in case there shall be more than one, and any one of them shall die under the age of 21, and without having been married, then in trust for the survivors or survivor, others or other of them their or her heirs executors, administrators and assigns, with like remainders over, in every like event of the death or deaths of any one or more of the surviving daughters under age and unmarried, to and amongst the survivors or survivor, others or other of the said daughters, such survivorship and accruer to extend in every such case, as well to the surviving as to the original shares, and if there shall be no such daughters or daughter, or none that shall live to be married, or to attain the age of 21, then as to the said leasehold estates and premises, subject as aforesaid, in trust for my brother, N. F., for his life, with remainders to his first and other sons successively, and to his daughters after them, as tenants in common with, and subject to the same conditional limitations and devises over to and amongst them respectively, as are hereinbefore contained, limited and provided, with respect to the sons and daughters of my said brother, M. F.; provided nevertheless, and my will is, that in the event of the decease of my said brother, M. F., without leaving issue of his body lawfully begotten, or leaving such

issue, and the sons (if any) shall all die before the age of 21, and without leaving issue as aforesaid, and the daughters (if any) shall all die before such age, and before any of them shall have been married as aforesaid so as to give effect to the conditional devise or limitation over to the said N. F., and his family, the said annuity of 300*l.* hereinbefore directed to be paid to the said O. F., shall cease to be payable, and instead thereof the annual sum of 500*l.* shall be paid to him and his assigns for and during the remainder of his natural life; and in case my said brother, N. F., shall die without leaving any children of his body, lawfully begotten, or there being such, all of them shall die, the sons (if any) before the age of 21, and without leaving issue as aforesaid, and the daughters (if any) before that age, and before any of them shall have been married as aforesaid, then as to the said leasehold estates and premises, and subject as aforesaid, in trust for my said brother, O. F., for his life, with remainders to his first, and other sons successively, and to his daughters after them, as tenants in common with, and subject to the same conditional limitations and devises over to and amongst them respectively, as are hereinbefore contained, limited, and provided, with respect to the sons and daughters of my said brothers, M. F., and N. F., as aforesaid. But in the event of such succession of my said brother, O. F., and his family to the beneficial interest in my said leasehold estates, under the said last mentioned disposition, my will is, that the annuity of 100*l.* hereinbefore by me directed to be paid to ———, do cease to be payable, and that instead thereof an annuity of 200*l.* be paid to her, and her assigns, for and during the remainder of her natural life. Provided always, and my will further is, that in case it shall so happen that my said brother, M. F., shall become intitled to the beneficial interest of and in the trust property contained in, and settled by the said indenture of the 20th day of October, 1804, under the limitations and provisions therein contained, or any of them, the said O. F., shall be entitled to receive out of the rents and profits of the said leasehold estates and premises, hereinbefore by me devised and bequeathed in trust as aforesaid, in lieu of the said annuity of 300*l.* the annual sum of 500*l.*, for and during the remainder of his na-

The estates and interests to shift on certain events.

No. 9.

If all the brothers die without issue living to acquire vested estates then in trust for —— for his life, remainder to the uses, &c. after limited and expressed with respect to the ultimate residue.

tural life, and in case of the deaths of my said brothers, M. F., N. F., and O. F., without leaving any such children of any of their bodies respectively, as aforesaid, or any that shall live to the age of 21 years, or have issue of their body, or bodies, if a son or sons, or be married, if a daughter, or daughters, then my will is, that my said trustees for the time being, do and shall stand, and be possessed of and interested in all my said leasehold estates, and premises, late the property of ———, so devised and bequeathed to them in trust, as aforesaid, subject to the several annuities, and other charges, in trust for ———, for the term of his natural life, and from and immediately after his decease, upon the trusts, and for the several ends, intents, and purposes hereinafter more particularly mentioned, touching the ultimate residue of my general personal estate. And as to, for, and concerning so much, and such part of my estate and effects as I shall become entitled to under, and by virtue of the said indenture of the 20th of October, 1804, in the event of my surviving ————, and all other my estate and effects, whatsoever and wheresoever; I direct the said, &c. and the survivors and survivor of them, his executors, administrators and assigns to stand possessed thereof, upon trust, as to such part and parts thereof, as may not, at the time of my decease, consist of stock in the public funds, to collect, get in and convert the same into money, and then to lay out and invest such money in some or one of the public funds and parliamentary stocks of Great Britain, in their own names, and as to such stocks, funds and securities, and also as to all other my property, estate and effects so devised and bequeathed to them as aforesaid, except the said leasehold property and estates which I have by this my will hereinbefore disposed of, to pay to or permit my said brother N. F. and his assigns, to receive the dividends, interest and annual produce thereof, for his life, with remainders to his first and other sons successively, and to his daughters after them, as tenants in common, with and subject to the same conditional limitations and devises over, to and amongst them respectively, as are hereinbefore contained, limited and provided, with respect to the sons and daughters of my said brother, touching the leasehold estates in the county of

Concerning the residue of the personal estate to convert the same into money and invest it in the funds. Testator then settles the same in the same way as his before-mentioned leasehold estates.

No. 9.

———, hereinbefore devised by my said will; and in case my said brother N. F. shall die without leaving any children of his body lawfully begotten, or, there being such, all such as shall be sons shall die under 21, and without issue as aforesaid, and all such as shall be daughters shall die before that age and before any of them shall have been married as aforesaid, then subject as aforesaid, in trust for my said brother M. F. for his life, with remainders to his first and other sons successively, and to his daughters after them, as tenants in common, with and subject to the same conditional limitations and devises over, to and amongst them respectively, as are hereinbefore contained, limited and provided, with respect to the sons and daughters of my said brother N. F., and in case my said brother M. F. shall die without leaving any children of his body lawfully begotten, or there being such, all such of them as shall be sons shall die under the age of 21, and without issue as aforesaid, and all such as shall be daughters, shall die under that age and unmarried, then subject as aforesaid, in trust for my said brother O. F. for his life, with remainders, in like manner, to his first and other sons, and to his daughters as tenants in common, in like manner; and with and subject to such conditional limitations as are before provided, with respect to the sons and daughters of my said brothers N. F. and M. F. successively; and in case the said O. F. shall die without leaving any children as aforesaid, or, there being such, if all such as shall be sons shall die under the age of 21, and all such as shall be daughters shall die under that age and unmarried, then, subject as aforesaid, in trust for T. C., the eldest son of ———, for his life, with remainders to his first and other sons, and to his daughters as tenants in common, in like manner, and with and subject to such conditional limitations as are before provided, with respect to the sons and daughters of my said brothers, N. F., M. F. and O. F. successively; and in case the said ——— shall die without leaving any children as aforesaid, or, there being such, all such as shall be sons, shall die under 21, and all such as shall be daughters shall die under that age and unmarried, then subject as aforesaid, in trust for T. C. the second son of the said ———, for his life, with remainders to the first and other sons aforesaid, and to his daughters as tenants in common

No. 10. in like manner, and with and subject to such conditional limitations as are before declared, with respect to my aforesaid brothers, and in case the said T. C. shall die without leaving any children as aforesaid, or, there being such, all such as shall be sons, shall die under 21, and without issue as aforesaid, and all such as shall be daughters shall die under that age and unmarried, then, subject as aforesaid, in trust for G. F. the daughters of the said ——, by his present wife, for her life, with remainder to her first and other sons, and to her daughters as tenants in common, in like manner, and with and subject to such conditional limitations as are before provided, with respect to my said brothers and their children respectively; but in case the said &c. shall all happen to die without leaving any issue lawfully begotten as aforesaid, then I direct my said trustees to stand possessed of all the rest, residue and remainder of my said estate and effects, upon the trusts, &c.

No. 10.

Will of an unmarried man, disposing of Property chiefly in charities and legacies.

THIS is the last will and testament of me, -, of ——— street, in the parish of ———, I desire to be buried in the same grave with my late wife, in ——— church yard, with as little ceremony as may consist with decency and propriety, and that a neat monument with proper inscriptions may be placed over the said grave, to her memory and mine; and my will is that all my funeral and testamentary expences, and all debts which shall be justly owing by me at my death, may, in the first place be duly paid and satisfied, with the payment whereof I hereby charge all my personal estate and effects of every descrip-

Debts, funeral and testamentary charges.

No. 10.

tion; I give, devise and bequeath unto —— and —— all that my copyhold or customary messuage, or tenement, garden and premises, with the appurtenances situate in —— aforesaid, held by me of the manor of ——, and which I have duly surrendered to the use of my will, to hold to them and their heirs and assigns for ever, as tenants in common and not as joint tenants; I give unto the treasurer for the time being of St. George's Hospital, at or near Hyde Park Corner, the sum of ——*l.* to be applied to the purposes of the said hospital; to the treasurer for the time being of the Middlesex Hospital, in or near ———, the like sum of ——*l.* to be applied to the purposes of the said hospital; to the treasurer for the time being of the Asylum for the Support and Education of the Deaf and Dumb Children of the Poor, situate in or near the Kent Road, near St. George's Fields, the like sum of ——*l.* to be applied to the purposes of the said asylum; to the treasurer for the time being, of the Asylum, or House of Refuge for Orphan Girls, situate near, or between Westminster Bridge and St. George's Fields aforesaid, the like sum of ——*l.* to be applied to the purposes of the said asylum; and to the treasurer for the time being, of the —— Charity School, in or near ——, the like sum of ——*l.* to be applied to the purposes of the said school; and as to all the rest, residue and remainder of my lands, tenements, hereditaments and real estate whatsoever and wheresoever, to which I am beneficially entitled, or which have been conveyed to or vested in me by way of mortgage or security, or in trust, and all my estate, right, title and interest in and to such mortgaged premises, and all securities for money, and all my stocks, turnpike bonds, insurance and other shares, and all other my goods, chattels, and personal estate and effects whatsoever and wheresoever, and of what nature or kind soever, (except such as are herein specifically, or otherwise by me disposed of) and all my estate and interest therein respectively, I give, devise, and bequeath unto A., B., C., and D., their heirs, executors and administrators respectively, according to the several natures and qualities of the same, upon the trusts following, (that is to say,) upon trust that they the said A., B., C. and D., and the survivors and survivor of them, and the

A copyhold estate to two persons as tenants in common.

Charities.

Sweeping residuary devise to trustees.

No. 10.

Upon trust as to the property vested in the testator as trustee upon the trusts concerning the same, as to the premises held on mortgage to receive the debt and interest and reconvey, and as to the rest of the residuary property to get in and sell, and convert into money, &c.

heirs, executors and administrators of such survivor, do and shall stand and be seised and possessed of all the estates and property vested in me as a trustee upon the trusts thereof, declared concerning the same respectively, and of the premises which I am seised or possessed of, or entitled to by way of mortgage, upon trust, to re-convey, assign, and dispose of the same respectively, when the principal and interest, and all other monies thereby secured, respectively shall be paid off, and do and shall receive the principal and interest, and other monies which shall be due therefrom respectively, and give receipts for the same when paid, and also do and shall, as soon as conveniently may be after my decease, collect and get in all such parts of the said residue as shall consist of money, or securities for money, and do and shall sell and dispose of all such of the said residue of my real estates of whatsoever denomination, to which I am beneficially entitled, and whereof I have power to dispose, and all my leaseholds and chattels real, and all other such parts of my personal estates and effects as shall be saleable (except such as herein are by me specifically disposed of) either by public auction or private contract, or otherwise, at their discretion, at or for the best price and prices that can or may be had and obtained for the same respectively; and I hereby declare that the receipt or receipts of my said trustees, or the survivor of them, or the executors or administrators of such survivor, or of the trustees or trustee of this my will, for the time being, shall be effectual discharges upon every such sale or sales to the purchaser or purchasers of the several premises herein made saleable, or any part or parts thereof, for his, her or their purchase monies, or for so much money as shall be therein acknowledged or expressed to have been received, and that such purchaser or purchasers, his, her or their heirs, executors, administrators and assigns, or any of them, shall not afterwards be answerable or accountable for any misapplication or nonapplication of such purchase money so received, or any part or parts thereof; and I will and direct, that out of the monies which shall arise and be produced by the sale or sales of such part or parts of my said estates and effects as are merely of a personal nature, except my leasehold tenements, the sum of ——*l.* of lawful money of Great

No. 10.

Britain, be set apart, and laid out and invested in the purchase of stock in some or one of the government funds or parliamentary stocks of Great Britain, the same to be transferred into the names of my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, or the trustees or trustee for the time being, of this my will, in the proper books kept for that purpose, and my will is that my said trustees or trustee for the time being, do stand possessed of, and interested in the said sum of 2400*l.* or the stock or securities in which the same may be invested; upon trust to pay and apply so much of the annual interest, dividends, and proceeds thereof as they my said trustees for the time being shall think necessary or proper for purchasing suitable cloaths or apparel for the 10 poor men and 10 poor women, for the time being belonging to and residing in the almshouses called ——— almshouses at ——— in the county of ——— at or about Christmas yearly, and to pay, apply, or dispose of the remainder thereof in equal proportions among or to and for the use and benefit of the said poor men and women.

Out of the money which shall be produced by the sale of the personal estate, to provide cloaths for certain poor persons.

And I further direct that out of the said monies which shall arise and be produced by the sale or sales of such part or parts of my said estates and effects as are merely of a personal nature, except my leasehold tenements, the further sum of ——*l.* of lawful money of Great Britain shall be set apart and placed out in the same manner as I have before directed with respect to the said last mentioned sum of money, and that my said trustees or trustee for the time being do lay out and apply the dividends and interest of the said last mentioned sum, or the stocks, funds, and securities in or upon which the same shall be invested as aforesaid in the purchase of bread of good quality to be distributed every Sunday morning after divine service among such 20 of the most deserving poor persons for the time being residing in the same parish and the township of ———, and who shall not receive other alms or parochial relief, the exercise and distribution of which charity my said trustees are hereby authorized and recommended to commit to the discretion of the rector and churchwardens of the said parish of ———,

And bread for such as do not receive alms, or parochial relief.

No. 10.

To set apart 7000*l*., and place out the same in the funds, and to pay the interest or dividends to the testator's half sister, for her separate use, and after her decease, to her husband for his life, and after the death of the survivor, to pay over the principal to and among their children.

for the time being. And I will and desire that my said trustees and the survivors or survivor of them, or the trustees or trustee of this my will for the time being, do and shall out of the said trust monies so to arise and be produced by such sale and sales of my real and personal property, or which shall be collected or got in, or be in their hands under and by virtue of this my will, raise and set apart the sum of 7000*l*. of lawful money of Great Britain, and place out and invest the same in some or one of the public funds or parliamentary stocks of Great Britain in the names of my said trustees or trustee for the time being, and do and shall stand and be possessed of and interested in the same money, stocks, funds, and securities, in trust to pay the dividends and interest thereof unto my half sister M. H. the wife of T. H. of ———, in the said county of ———, or to authorize and empower her to receive the same half yearly as the same shall become due during her natural life, the same to be paid into her own hands, or to such person or persons as she shall by writing under her hand appoint to receive the same, notwithstanding her coverture, and not to be subject to the controul, debts, or engagements of her husband, and her receipts, or the receipts of such person or persons as she may appoint to receive the same, to be the only proper discharges for the same; and after her decease, do and shall pay to, or empower her said husband T. H., if he shall survive her, to receive the said dividends and interest of such stock for and during the remainder of his natural life; and after the death of the survivor of them the said M. H. and T. H. that they my said trustees, or the trustees or trustee of this my will for the time being, do and shall transfer the principal of such last mentioned stock unto and equally between and among all and every the child or children of the said M. H. and T. H. who shall be living at the decease of the survivor of them, and the lawful issue of such of the children of the said M. H. and T. H. as shall have died in the lifetime of the survivor of them, in equal shares and proportions, but so and in such manner as that such issue of any of the said children who shall have died in the lifetime of the survivor of the said M. H. and T. H. shall only receive (in equal propor-

No. 10.

tions if more than one) the share or proportion to which their his or her deceased parent would, if living, have been entitled. I also direct that my said trustees, or the trustees or trustee of this my will for the time being do and shall by and out of the said trust monies and effects so in their hands as aforesaid raise and set apart the further sum of 3000*l.* of like lawful money, and place out and invest the same in some or one of the public funds or parliamentary stocks of Great Britain in their or his own names or name as aforesaid, and do and shall stand and be possessed of and interested in the same, in trust to pay the dividends or interest of such last mentioned stocks, funds, and securities unto A. C. the wife of my nephew H. C. of ——— in the said county of ——— half yearly as the same shall become due, during her natural life, the same to be paid into her hands or to such person or persons as she shall by writing under her hand appoint, notwithstanding her coverture, exclusively of her present or any future husband, who is not to intermeddle therewith, nor is the same to be subject to his controul, debts, or engagements, and her receipts or the receipts of such person or persons as she may so appoint to receive the same only to be effectual discharges for the same, and after her decease do and shall transfer the principal of such stock unto and equally between, or among all and every the child and children of the said A. C. and H. C. who shall be living at her decease; and the lawful issue of such of the said children as shall be then dead in equal shares and proportions, but so and in such manner as that the issue of any of the said children who shall die in the lifetime of the said A. C. shall only receive (in equal proportions if more than one) the share to which his her or their deceased parent would, if living, have been entitled. And I further desire and direct that my said trustees or the trustees or trustee for the time being do and shall out of the same trust monies and effects raise and set apart the further sum of 3000*l.* of like lawful money, and place out and invest the same in some or one of the public funds or parliamentary stocks of Great Britain in their or his own names or name, and do and shall stand and be possessed of and interested therein, in trust to pay the di-

Similar settlement on A. C., the wife of H. C., and her children, by H. C.

And on M. T., the wife of C. T. and her children.

No. 10. vidends or interest thereof unto M. T. the wife of C. T. of —— in the said county of ——, half yearly, as the same shall become due during her natural life, the same to be paid into her hands or to such person or persons as she shall by writing under her hand appoint to receive the same, notwithstanding her coverture, exclusively of her present or any future husband, and who is not to intermeddle therewith, nor is the same to be subject to his controul, debts, or engagements, and her receipts, or the receipts of such person or persons as she shall so appoint to receive the same only to be effectual discharges for the same; and after her decease do and shall transfer the principal of such last mentioned stock unto and equally between and among all and every the child and children of the said M. T. and C. T. who shall be living at her decease, and the lawful issue of such of the said children as shall then be dead in equal shares and proportions, but so and in such manner as that the issue of any of the said children who shall die in the lifetime of the said M. T. and C. T. shall only receive (in equal proportions if more than one) the share to which their, his or her deceased parent would, if living, have been entitled. And I will and direct that my said trustees or the trustees or trustee of this my will for the time being do and shall out of the said trust monies and effects also raise and pay for and to ——— the eldest son and ——— the second son of ——— the elder the sum of 1000*l.* a piece of lawful money of Great Britain and for and to ——— and ——— daughters of the said ——— the elder the sum of 500*l.* a piece of like lawful money (exclusively of the fund to which they or their respective issue may become entitled upon the decease of their said mother as hereinbefore mentioned) the same to become vested in and payable to the said —— and —— the sons when and as they respectively shall attain the age of 21 years, and the said —— and —— the daughters when and as they shall respectively attain that age or be married, and do and shall out of the said trust monies and effects raise and pay for and to the three sons and two daughters of Mr. —— (that is to say) A. B. H. R. and T. the sum of 200*l.* a piece of like lawful money; and I will and declare that as to

No. 10.

the legacies hereinbefore given or directed to be raised and paid to and for the said A. B. H. R. and T. if any one or more of such children respectively shall happen to die before he she or they shall have acquired a vested interest or vested interests under this will, the legacy or share of the person or persons so dying, shall go and survive to his, her, or their surviving brothers and sisters, and the issue of such of the said children as shall have lived to acquire vested interests, and that all and every the accruing share and shares shall respectively again be subject to the same condition and contingency of survivorship and accruer, as is hereinbefore declared touching the original legacies or shares.

The sum of 10,000*l.* to his niece, to be laid out in the funds, and disposed of as she shall direct.

I give and bequeath to my dear niece (the daughter of ——, of ——, and —— his wife,) who has for many years resided with me, the sum of 10,000*l.* of lawful money of Great Britain, which sum I desire may be laid out by my said trustees, or trustee, for the time being, in some or one of the public funds, or parliamentary stocks of Great Britain, in the joint names of her the said ——, and my said trustees, or trustee, for the time being, to be disposed of as she shall, by writing under her hand, direct; I also give to my said dear niece, ——, all my household goods and furniture, plate, china, glass and linen, to and for her own absolute use and benefit; and I give to her brother, my nephew, the said ——, (son of the said ——, and —— his wife,) the sum of 5000*l.* of lawful money of Great Britain, for his own absolute use and benefit; I also give to him, the said ——, all my books, printed or written, and all my maps, accounts and papers whatsoever.

The sum of 5000*l.* to his nephew ——, and his books, maps, &c.

Legacies, not become vested, to be laid out in the funds, to accumulate, with power for the trustees to apply the same, or so much as they shall think proper, towards the

I desire that such of the legacies hereinbefore given, as shall not have become vested interests under this my will, may be laid out in some or one of the public funds, or parliamentary stocks of Great Britain, to accumulate for the benefit of those who respectively shall be presumptively entitled thereto, with full power, however, for my said trustees, or trustee, for the time being, to pay or apply the dividends and interest thereof respectively, or so much thereof as they, in their or his discretion may think proper or requisite, for or towards the maintenance or education of the person or persons so respectively presumptively entitled, and in such manner as my said trus-

No. 10. tees shall think most fit for their respective benefit and advantage. And I direct that my said trustees shall stand possessed of the net surplus, or remainder of the whole of the said residue of my estate, effects, and property in trust for, and for the only absolute use and benefit of my nephew, ——, the younger, his executors and administrators, and to be paid, transferred, and disposed of, as he or they shall from time to time direct; and my will is, that all the legacies and bequests hereby given, shall be paid and appropriated by my said trustees for the time being, as soon as conveniently may be after my decease. And I further declare it to be my will, and I do hereby direct, that in case the said ——, or any or either of them, or any succeeding or future trustee, or trustees shall die, or be desirous of being discharged from, or become incapable of acting in the same trusts before the same shall be fully executed and performed, that then, and in every such case, it shall and may be lawful to and for the surviving or continuing trustees or trustee of this my will, for the time being, or the executors or administrators of such survivor, by any writing, under his or their hand and seal, or hands and seals, and to be attested by two or more credible witnesses, to nominate or appoint any other fit and respectable person or persons to be a trustee, or trustees, for the purposes aforesaid, or such of them as shall be then subsisting, or capable of taking effect, in the place or stead of the trustee, or trustees, so dying, or desiring to be discharged, or becoming incapable of acting in the said trusts, and that when and so often as any such new trustee or trustees shall be nominated and appointed as aforesaid, the surviving, or continuing trustees or trustee for the time being, or the executors or administrators of such survivor shall assign and transfer my said trust estate and property, so and in such manner (so far as the nature thereof will admit,) as that the same may become vested in such new trustee, and the surviving or continuing trustee or trustees jointly, or in such new trustee only, upon the trusts, and to and for the intents and purposes hereinbefore declared of and concerning the said trust estate and property respectively, and which shall be then subsisting, or capable of taking effect, and so from time to time; and such new trustee and

maintenance of the children presumptively entitled. Residue to his nephew ——.

Clause for changing trustees, &c.

trustees shall and may act in the execution and management of the trusts aforesaid, and shall have, and be considered as invested with such and the same powers and authorities, as if he or they had been originally appointed by this my will; and further, that they, the said ———, or any, or either of them, or their, any, or either of their executors or administrators, shall not be answerable for, or liable to make good any casual, or involuntary loss, which at any time or times may accrue or happen of or unto the said trust monies, or the securities for the time being in which the same shall be invested, or any part thereof, or with respect to any other part of the said trust estate, without his or their wilful default; nor shall they, or any of them, be answerable or accountable, the one for the other, or others of them, or for the acts, deeds, receipts, payments, neglects, or defaults of the other or others of them, but each of them for his own acts, deeds, receipts and payments only, and for such monies only, as shall actually come to his or their several and respective hands, and not for any money or stock, for which they, or any of them, shall join in any transfer, or sign any receipt, or receipts, for conformity only, nor with or for any loss or damage which may happen, by depositing all or any of the trust monies aforesaid, in any bank or banker's hands, or elsewhere, for safe custody, nor with or for any other loss or damage which shall or may happen in or about the execution or exercise of all or any of the trusts aforesaid, without their wilful defaults. And that it shall and may be lawful to and for them, the said trustees respectively, and their respective executors and administrators, from time to time, by and out of the trust monies, which shall come to their, or any of their hands, in the first place to deduct and retain, and reimburse to themselves respectively, and allow to their or his co-trustee, or co-trustees, all such loss, costs, charges and expences whatsoever, as he, they, or either of them, shall or may respectively pay, suffer, sustain, expend, or be any way put unto, in, or about the execution of all or any of the trusts or powers, hereinbefore mentioned or created, or any matter or thing in any wise relating thereunto.

No. 10.

No. 11.

No. 11.

A Will, disposing only of personal property, in favour of the Testator's daughter, and her children.

Directions as to place and manner of interment.

THIS is the last will and testament of me, J. S., of T., in the county of ———, esquire: first, I will and direct, that in case I shall die within the distance of 10 miles from S., in the said county of ———, my body may be interred in the parish church there (where my late wife, A. S. lies buried,) in a decent, but very plain manner, at the discretion of my executors, hereinafter named, (who, in case of any occurrence taking place to prevent my being buried at the place above-mentioned, may direct my interment at such other place as they shall judge most proper,) the expences attending which interment, and also all my just debts, and the expences of proving this will, and also the legacies hereinafter by me given, I do direct my executors to pay and discharge as soon as conveniently may be after my decease. I do hereby constitute and appoint A. B., of ——— ———, C. D., of ———, and E. F., of ———, to be the executors of this my will; and, in the first place, I give and bequeath to them, the said A. B., C. D., and E. F., as such my executors, the capital stock or sum of 8000*l.* five per cent. annuities, or so much of such other stock standing in my name at the time of my decease, as will be sufficient to produce the annual sum of 400*l.*; and in case I shall not, at the time of my decease, have sufficient stock standing in my

Appointment of executors.

Bequeaths a certain quantity of stock in the public funds to his executors.

name, to produce that sum annually, then I give and bequeath to my said executors so much money as will be sufficient to purchase so much stock in one or other of the parliamentary funds of Great Britain, (according to the then current price thereof,) as will produce such annual sum, (which stock I do hereby direct my executors to purchase accordingly,) upon trust, that they, my said executors, do and shall cause the said stock to be transferred into their own names, jointly with the trustees or trustee under the settlement or contract made on my marriage with my present wife, J. S.; and do and shall pay the interest or dividends arising from such stock to my said wife, (when and as the same shall from time to time arise and be received,) during her life, for her own use and benefit: and from and after the decease of my said wife, J. S., my will is, and I do hereby direct, that the stock hereinbefore by me given or directed to be purchased for her benefit, shall sink into, and become part of, my residuary estate, and shall go and be applied according to the dispositions hereinafter by me made of the same. Provided, and I do hereby expressly declare my will to be, that the provision made by this my will for my said wife, J. S., is by me intended to be, and to be accepted by her, in lieu, and in full satisfaction and recompence of all such benefit or provision, as I have, by such marriage settlement, or contract, provided or made, or covenanted, agreed, or contracted to provide, or make for her, either by way of annuity, or otherwise howsoever; also, I give and bequeath to A. B., C. D., and E. F., the sum of 5000*l.* of lawful money of Great Britain, upon trust, that they, my said executors, or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall, with all convenient speed, place out and invest the same sum, and every part thereof, in their or his own names or name in the public stocks or funds of Great Britain, or on real or government securities in England, at interest, and do and shall stand and be possessed of and interested in such last-mentioned stocks, funds, or securities, upon the several trusts, and to and for the several ends, intents, and purposes, and with under and subject to the several powers and provisos hereinafter ex-

No. II.

The stock to be transferred into their own names, together with the names of the trustees in the settlement or articles made on the testator's marriage.

To pay the dividends to his wife for her life, and after her death the principal to sink into, and become part of, the testator's residuary estate.

That the said provision for his wife shall be in lieu of her dower.

Testator then gives 5000*l.* to his trustees.

To invest the same in in their names.

No. 11. pressed, and declared of and concerning the same, that is to say, upon trust, that they, my said executors and trustees, or the trustees, or trustee, for the time being, do and shall transfer, assign, and pay the said last-mentioned stocks, funds, and securities unto all and every the child and children of my daughter, Mary Elizabeth L., (wife of J. L. C., of B., in the county of ——,) by her present husband, (other than and except an eldest or only son, or an eldest daughter, entitled for the time being to the estate at B., aforesaid, which is entailed on the eldest child of their marriage) at such age, day, or time, if there be but one, and if more than one, then at such respective ages, days, or times, and in such parts, shares, and proportions, and subject to such conditions, restrictions, and limitations over, (such limitations over to be for the benefit of some or one of the said children) as my said daughter, M. E. L., at any time or times during her life, by any deed or deeds, writing or writings, with or without power of revocation, to be sealed and delivered in the presence of, and attested by two or more credible witnesses, or by her last will and testament in writing, or any writing in the nature of, or purporting to be her last will and testament, or any codicil or codicils thereto, to be signed and published in the presence of, and attested by two or more credible witnesses, (whether she shall be covert or sole, and notwithstanding any coverture she may be under) direct or appoint; and in default of such direction or appointment, then upon trust, that they, my said executors and trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall transfer the said stocks, funds, or securities to such child, if there shall be but one, and the same shall be a daughter, on her attainment to the age of 21 years, or day of marriage, provided the same is contracted with the consent of my said daughter, M. E. L., or if a son, upon his attainment to the age of 21 years; and if there shall be more such children than one, then my will is, that the same stocks, funds, and securities, in default of such direction or appointment as aforesaid, be equally divided between or among them, share and share alike; the share or shares of such of them as shall be a

To transfer and assign the same last-mentioned stocks, &c. to the children of testator's daughter, M. E. L. according to the appointment of the said M. E. L.

And in default of appointment, among the children equally, with survivorship.

No. 11.

daughter or daughters, to be transferred to her or them respectively, on her or their attaining her or their age or respective ages of 21 years, or on the day or respective days of her or their marriage, which shall first happen, (provided such marriage shall be had with the consent of my said daughter M. E. L.); and the share or shares of such of them as shall be a son or sons to become vested in him or them respectively, on his or their attaining his or their age or respective ages of 21 years. Provided nevertheless, and I do hereby declare, that the appointment to be made by my said daughter M. E. L., of any such portion or portions as aforesaid, pursuant to the power hereinbefore given to her, shall not be invalidated or prejudiced by any omission or default of her appointment of the residue of such portions, under or by virtue of any such direction or appointment, made pursuant to the same power, but that any such child or children who shall be benefited by any such partial appointment shall have or be entitled to no further or other share of or in the unappointed residue of the said stocks, funds and securities, until every other child shall have received so much of such unappointed residue as will make his or her share or portion equal, if not otherwise so, to that of the child so taking under such direction or appointment as aforesaid. Provided, and I do hereby declare, that if any such child or children, being a son or sons, shall depart this life before he or they shall attain his age, or their respective ages of 21 years (without leaving lawful issue of his or their body or bodies) or being a daughter or daughters shall depart this life before she or they shall attain her age or their respective ages of 21 years, or be married, then and in default of any such direction or appointment as aforesaid, the share or shares of him, her, or them so dying, of and in the said stocks, funds, and securities, shall go and accrue to the survivors or survivor, or others or other of such children, and be equally divided between or among them, if more than one, share and share alike, and be tranferable at such ages, days, and times as his, her, and their original portion or portions shall, by virtue of this my will, become transferable as aforesaid; and that in case of the death of any other of the

That any appointment of part shall stand good; but in case of a partial appointment, those who are the objects of it shall not come in with the rest, until they shall have so much of the unappointed residue as will make their shares equal.

No. 11. said children (without having lawful issue before such accruing or surviving share or shares shall become vested as aforesaid) then every such accruing or surviving share or shares shall again become subject and liable to such further right, chance, contingency, or condition of accruer or survivorship, as hereinbefore is declared, touching the original portion or portions.

In case of any dying and leaving issue, such issue to take the shares of their respective parents, at the same age and time as is before declared with respect to the shares of their parents.

Provided nevertheless, and I do hereby expressly declare, that in case any such child or children shall have left issue of his her or their body or bodies lawfully begotten, then my will is, that such issue shall have and be entitled to such share or shares of and in the said stocks, funds, and securities as his, her, or their deceased parent or parents would have had and been entitled to under this my will, if living, (such share or shares to be transferred to such issue, at such age or time as hereinbefore declared with respect to the transfer of their parents' shares).

The interest of their respective shares to be applied in maintenance.

And upon further trust, that they my said executors and trustees, or trustee for the time being, do and shall pay and apply the dividends, interest and proceeds of the share or shares of such of the said children as shall not have acquired a vested interest in the share or shares hereinbefore provided or intended for him, her, or them, for or towards his, her, or their maintenance and education respectively, until the same respectively shall become transferable, until which

That the daughter is to have the education and maintenance of her children.

period it is my will that my said daughter M. E. L. shall (if she shall so long live) have and be entrusted with the maintenance, education, and controul of her said children, and shall receive from my said trustees or trustee, such dividends, interest, and proceeds, for the purpose of enabling her to undertake, carry on, and defray the expences of the same.

The said sum of 5000*l.* to be received in lieu and satisfaction of the like sum of 5000*l.* secured by bond, to be paid to the husband of his daughter on the marriage.

Provided, and my will is, and I do hereby expressly declare, that the said sum of 5000*l.* hereinbefore given and directed to be laid out for the benefit of the younger children of my said daughter M. E. L. by the said J. L. C., her present husband, is by me meant and intended, and shall accordingly be considered, and be accepted and taken, as and in lieu and full satisfaction and recompence of the sum of 5000*l.* which, by a bond executed by me previous to the marriage of my said daughter with her said husband, I have

secured to be paid for the benefit of such younger children, according to his appointment, which appointment, by reason of the mental imbecillity of the said J. L. C., cannot now be made in a proper, reasonable, and effectual manner. And therefore, my will further is, and I do hereby accordingly direct and declare, that in case any claim or demand shall be made, and any proceedings at law or in equity shall be commenced or instituted, either by the said J. L. C., or by any other person or persons, in his name, or on his account or behalf, or claiming by, from, through, or under, or in trust for him, upon, or in respect of the said bond, or the said sum of 5000*l.* thereby secured, or any part thereof, or any interest to arise therefrom, my said executors and trustees, or the trustees or trustee for the time being, shall forthwith apply to the High Court of Chancery, for redress against such claim and demand, or adopt such proceedings as they shall be advised to pursue by their counsel, for resisting the same; the expences of obtaining which opinion of counsel, and of such application to the said court, and of all such other proceedings as shall be advised and adopted as necessary to resist such claim, I do hereby empower and direct my said executors and trustees, or the trustees or trustee for the time being, to pay and discharge out of my residuary personal estate. And my will further is, and I do hereby expressly order, that in case any person or persons, for whom or for whose benefit a provision is hereby made, or intended to be made, shall make or prosecute any claim or demand for or in respect of the said bond, or the said sum of 5000*l.* or any part thereof, then and from thenceforth such person or persons shall be utterly excluded and debarred from all benefit or provision under or by virtue of this my will, or of the dispositions therein contained. Provided also, and my will is, and I do hereby further direct, that in case all and every the child and children of my said daughter M. E. L., by the said J. L. C., her present husband, (other than and except an eldest or only son, and an eldest or only daughter, entitled, for the time being, to the said estate at B. aforesaid) who, being sons, shall depart this life under the age of 21 years, without leaving lawful issue of their, or any of their bodies, or being daughters, shall depart this

No. 11.

Which said marriage portion cannot now be paid to the husband, on account of his mental imbecility.

If any claim for such portion shall be set up and litigated, the trustees are to resist it, and defray the expences out of the residuary estate.

And if any body shall prosecute any claim upon the bond, this legacy to be void.

No. 11. life under that age and without having been married, then they; my said executors and trustees, or the trustees or trustee for the time being, shall stand possessed of, and interested in the said stocks, funds, and securities, or so much thereof as shall remain unappointed or undisposed of, as aforesaid, in trust for, &c.

Testator devises 800*l.* capital stock to his trustees, to pay the dividends to the eldest son of his daughter, until he shall come into possession of the estate settled upon him, by way of support in the interim; and when he shall come into possession of the settled estate, or if he shall die in the life-time of his father, then the said capital to sink into the residue.

And I do hereby also give and bequeath to the said A. B., C. D., and E. F., their executors, administrators and assigns, the capital stock, or sum of 800*l.* five per cent. annuities, or so much of such other stock standing in my name at the time of my decease, as will be sufficient to produce the annual sum of 40*l.*; and in case I shall not, at the time of my decease, have sufficient stock standing in my name, to produce that sum, then I give and bequeath to my said executors and trustees, so much money as will be sufficient to purchase so much stock (according to the then current price thereof) as will produce such annual sum, upon trust, that they my said executors and trustees, or the trustees or trustee for the time being, do and shall cause the same to be transferred into their or his own names or name, and do and shall, until my grandson J. L., the eldest son of my daughter M. E. L., shall come into possession of the estate at B. aforesaid, (so entailed on the eldest child of the marriage of my said daughter and her present husband, as hereinbefore mentioned) pay the interest or dividends arising from the said stock, unto my said grandson J. L. and his assigns, and authorise and empower him and them to receive the same to and for his own use and benefit. Provided, and my will is, and I hereby direct, that from and after the decease of my son-in-law, the aforesaid J. L. C. whereby my said grandson J. L. will come into possession of the said estate at B., aforesaid, or be entitled to the receipt of the rents, issues, and profits thereof, or in case my said grandson shall depart this life in the lifetime of his said father, then from and after his decease, whichever shall first happen, the stock hereinbefore by me given, or directed to be purchased for the benefit of my said grandson, shall sink into and become part of the residue of my personal estate, and shall go and be applied according to the dispositions thereof hereinafter contained. And I do hereby give

and bequeath to each of my grand-daughters, S. and M., (over and above their share in the said sums of *5000l.*, as two of the younger children of my said daughter, M. E. L., by the said J. L. C., her present husband, and over and besides such other shares and benefit as they respectively shall have or take under this my will) the sum of *1000l.* of lawful money of Great Britain, to be an interest vested in them respectively on their respectively attaining the age of 21 years, or on their respective days of marriage, with such consent as hereinbefore mentioned, which shall first happen, nevertheless the actual payment thereof shall be postponed until after the decease of my said daughter, M. E. L. (who, during her life, shall have and be entitled to the interest and produce thereof). Provided, and I do hereby declare, that in case either of my said grand-daughters S. and M. shall depart this life before she shall attain her age of 21 years, or be married, then the sum of *1000l.* hereinbefore given to her, (in the event of her attaining such age or being married) shall go and be paid to the survivor of my said two grand-daughters, to become vested and payable as hereinbefore is mentioned in respect to her original share.

No. 11.

An additional legacy to two grand-daughters.

And in case both my said grand-daughters S. and M. shall depart this life under the age of 21 years, and without having been married, then the said two several sums of *1000l.* (hereinbefore given to them in the event of their attaining such age, or being married as aforesaid) shall sink into and become part of my residuary personal estate, and shall go and be applied according to the dispositions thereof hereinafter contained. And I do hereby give and bequeath to my said executors and trustees the like sum of *1000l.* of like lawful money, upon trust, that they my said executors and trustees, or the trustees or trustee for the time being, do and shall lay out and invest the same in their or his own names or name, in or upon government or real securities in England, at interest; and do and shall during the minority of my natural son (1) J. S. now aged 13 years or thereabouts,

Gives *1000l.* to be laid out by the trustees in the funds in their names, who are to apply the dividends in maintaining the testator's natural son.

(1) Illegitimate children may take when born by their names of reputation, or by words clearly describing them, and the rule is,

No. 11. born at ——, on the 23d day of October 1789, now at school at ——, pay, apply, and dispose of the dividends, interest, or proceeds of the said last-mentioned stocks, funds and securities for and towards his maintenance and education, and in providing clothes and other necessaries for him, in such way as my said trustees or trustee shall think advisable: and upon further trust, that when and so soon as my said natural son J. S. shall have attained the full age of 21 years, then that my said executors and trustees, or the trustees or trustee for the time being, do and shall transfer and assign the said stocks, funds, and securities unto my said natural son, to and for his own use and benefit. Provided nevertheless, and I do hereby declare, that it shall and may be lawful to and for my said executors and trustees, or the trustees or trustee for the time being, to raise by and out of the said stocks, funds, and securities, upon which the said sum of 1000*l.* shall be so invested, any sum or sums of money, not exceeding in the whole the sum of ——*l.* for the purpose of placing out my said natural son J. S. apprentice, or otherwise for preferring or advancing him in or to any profession, business or employment, and to pay, apply, and dispose of the money so to be raised for any of those

And when he comes of age to transfer the stock to him for his own use.

With liberty to apply a certain sum as an apprentice fee, or for placing him out.

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that they must be pointed out by clear description, for the law shews them no favour. And if a man devises to such natural children as shall be born of J. S., such children born after the making of the will shall not take, Metham *v.* Duke of Devon, 1 P. Wms. 529. nor even a child in ventre sa mere; for besides the objection on the ground of immorality, a bastard cannot take until he has gained a name by reputation, which cannot be before he is born. Thus, under a bequest "to such child or children, if more than one, as A. may happen to be enseint of by me," a natural child, of which A. was then pregnant, was held incapable of taking. Though the Master of the Rolls, Sir W. Grant, seemed to think that a bequest to the natural child, of which a particular woman was enseint, without reference to any person as the father, might probably be good, as there was no uncertainty in the bequest. The case was decided upon the rule of law which does not acknowledge a natural child to have any father, even by reputation, before its birth. Earle *v.* Wilson, 17 Vez. Jun. 523.

purposes accordingly, in such way and manner as they or he shall judge most adviseable for his benefit. (Provided nevertheless, and I do hereby expressly declare, that no deduction or abatement shall be made out of the said sum of 1000*l.* for or on account of any bills that may, at the time of my decease, be due or be accruing, for or in respect of the maintenance, education, or clothing of my said natural son J. S.; but that such bills shall be defrayed, with the rest of my debts, out of my residuary personal estate, before any division thereof shall be made.

No. 11.

No part of such sum of 1000*l.* to be applied in paying any bills owing at testator's death, for the said son.

Provided, and my will is, and I do hereby declare, that in case my said natural son J. S. shall depart this life before he shall attain the full age of 21 years, then the said sum of 1000*l.* hereinbefore given and directed to be laid out for his benefit, or the stocks, funds, or securities wherein or upon which the same shall then be invested, or so much thereof as shall not have been applied or disposed of for the advancement or preferment of my said natural son, according to the authority hereinbefore contained and given for that purpose, shall sink into and become part of my residuary personal estate, and shall accordingly be applied upon the trusts hereinafter by me directed concerning the same. And I do hereby give and bequeath to my said wife, J. S. for her own use and benefit, all my household furniture, plate, linen, china, liquors, provisions, and other household goods and furniture that may be in and about my dwelling house at the time of my decease, save and except all books, papers, and manuscripts, it being my will and desire, and I do hereby direct, that such of the said books and papers as shall be necessary for settling or elucidating my affairs or concerns, shall be delivered to my executors hereinafter mentioned, and that such of the same books, papers, and manuscripts as shall not be necessary for that purpose, shall be delivered to my said daughter M. E. L., to be preserved or destroyed, or otherwise disposed of, as she shall think fit. Also I give and bequeath to my said wife J. S. the sum of 200*l.* for the purpose of providing mourning for herself and children; and also the sum of 20*l.* for mourning to her servants: also I give to my said wife five guineas for a ring for herself, and 7*l.* 10*s.* for six mourning rings, of

This sum, if not wanted, to sink into the residue.

Gives to his wife all his furniture, plate, linen, china, liquors, &c.

Such books and papers as may be necessary for settling or elucidating his affairs, to his executors.

His other books and papers to his daughter.

200*l.* to his wife for mourning.

20*l.* for his servants' mourning.

To his wife five gui-

No. 11. twenty-five shillings each, for any six persons she may think proper to give them to. Also I give to my aforesaid grandson J. L., my diamond ring, and to my grandson W. L. (second son of my said daughter, M. E. L.) or such other son of my said daughter, as at the time of my decease shall be the second son in seniority, my gold watch, or in case my said watch shall be worn out, lost, or destroyed, 30*l*. in lieu thereof: and I give to my nephew, R. C. D., 200*l*., to be paid to him at my death. I give to each of my said executors, hereinbefore by me appointed, twenty guineas for their care and trouble in the execution of this my will; and also a ring of the value of twenty-five shillings: also I give to my servant, S. (for her care and attention to me,) twenty guineas, to be paid to her within one month next after my decease. And as to all the rest, residue and remainder of my personal estate and effects whatsoever and wheresoever, whereof or whereto, I or any person or persons in trust for me, shall, at the time of my decease, be possessed or entitled, (and not hereinbefore by me otherwise disposed of,) and whereof I have power to dispose by will, I do hereby give and bequeath the same unto my said executors, upon trust, that they the said A. B., C. D., and E. F., or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall, with all convenient speed, collect, get in, and receive such part thereof as shall consist of money, or securities for money, and do and shall convert into money such part thereof as shall not consist of money, or securities for money, and lay out and invest the same, and every part thereof, in their or his own names or name, in the parliamentary stocks or funds of Great Britain, or on real or government securities in England, at interest; and do and shall stand and be possessed of, and interested in, all such stocks, funds, or securities, upon the several trusts, and to and for the several ends, intents, and purposes, and with, under, and subject to the several powers and provisos hereinafter expressed and declared, of and concerning the same, that is to say, upon trust, that they my said executors or trustees, or the trustees or trustee for the time being, do and shall, during the natural life of my said daughter, M. E. L. pay the divi-

[Margin notes: neas for a ring, and a sum for six rings to friends. Other specific bequests. — Testator gives all the rest and residue of his personal estate to the same trustees. — To convert the same into money, and place it out in the funds, or on government or real securities in England. — And to stand possessed of the said stocks, funds, and securities upon trust, to pay the interest and divi-]

dends, interests, and proceeds of the said last-mentioned stocks, funds, and securities, unto such person or persons only, and for such intents and purposes only, as my said daughter, M. E. L. shall, by any writing or writings under her hand, from time to time, notwithstanding her present or any future coverture, direct or appoint, and in default of such direction or appointment, do and shall pay the same, or so much thereof as she shall or may, from time to time, happen to make no direction or appointment of into the proper hands of my said daughter, M. E. L., for her sole and separate use and benefit, exclusively of her present or any future husband, who shall not intermeddle therewith, nor shall the same or any part thereof be subject or liable to the power, control, debts, or engagements of any such husband, but the receipts of my said daughter, M. E. L., and of such person or persons as she shall or may, from time to time, direct or appoint to receive the same, shall, notwithstanding her present or any future coverture, be good and effectual releases and discharges for the same, or so much thereof as in such receipts shall be expressed or acknowledged to have been received. Provided nevertheless, and my will is, and I do hereby expressly declare, that my said daughter, M. E. L., shall not have power to sell, assign, mortgage, or otherwise incumber the said dividends, interest, and proceeds, or any part thereof, by anticipation, whilst in the hands of my said trustees or trustee; and from and after the decease of my said daughter M. E. L. (or in her life-time, if she shall direct the same by any deed or writing under her hand and seal, executed in the presence of, and attested by, credible witnesses,) upon trust, that they, my said executors and trustees, or the trustees or trustee for the time being, do and shall transfer, assign and pay the said last-mentioned stocks, funds, and securities unto all and every the child and children of my said daughter, M. E. L., whether by her present or any after-taken husband (other than and except an eldest or only son, or an eldest daughter, entitled for the time being to the estate at B——— aforesaid,) according to her appointment, by deed or will, in like manner, as hereinbefore declared, with re-

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dends during his daughter's life to such persons as she shall, notwithstanding her coverture, direct and appoint.

And in default of appointment, into the proper hands of his daughter, for her sole and separate use.

Proviso that his daughter shall not incumber or anticipate the said dividends.

Power for the daughter to appoint the same either in her lifetime, or after her decease,

No. 11. spect to the stocks, funds or securities, wherein or upon which the said sum of 500*l.* (hereinbefore given) shall be invested, and in default of such direction or appointment, then upon trust, that they my said executors and trustees, or the trustees or trustee for the time being, do and shall transfer, assign, and pay the same stocks, funds, or securities unto all and every the child and children of my said daughter M. E. L. whether by her present or any future husband, (other than and except an eldest or only son or an eldest daughter entitled as aforesaid) in like manner and with the like condition of survivorship and power of maintenance and education to and amongst all such children, and subject to all such powers, provisos, and restrictions as hereinbefore declared, with respect to the stocks, funds, or securities, wherein or upon which the said sum of 5000*l.* shall be invested. Provided also, and my will is, and I do hereby further direct, that in case all and every the child and children of my said daughter M. E. L. whether by her present or any future husband (other than and except an eldest or only son, or only daughter, entitled for the time being to the aforesaid estate at B.) shall depart this life before their said shares or any of them shall have become vested according to the directions of this my will, then my said trustees or the trustees or trustee for the time being shall stand possessed of, and interested in, all and every the stocks, funds, and securities, wherein or upon which my said residuary personal estate, or any part thereof, shall be placed out, or invested (or so much thereof as shall remain unappointed or undisposed of as aforesaid,) in trust, &c. Provided always, and my will is, and I do hereby declare that it may be lawful to and for my said trustees, or the trustees or trustee for the time being, (with the consent and approbation of my said daughter M. E. L. signified in writing under her hand, if living, and if she shall be then dead, then of the proper authority of my said trustees or trustee for the time being,) to sell and transfer all or any of the stocks, funds, or securities, wherein or upon which any part of my property shall be placed out or invested, in pursuance of this my will (but not without the consent in writing of my said wife J. S. if living, in case any of the stocks, funds, or secu-

And in default of appointment to and among her children equally, with survivorship, except an eldest son, or eldest daughter, entitled as aforesaid.

Power for the trustees to vary and transpose the securities.

rities, directed to be sold or transferred, shall form part of the security or provision hereinbefore devised for the benefit of my said wife during her life) and to lay out and invest the money to be produced by or from such sale or transfer, in or upon any other of the parliamentary stocks or funds of Great Britain, or on any other real securities in England, at interest, and from time to time (with the like consent and approbation as aforesaid,) to vary, alter, and transpose all such stocks, funds, and securities for others of the like nature, when and so often as it shall be desirable or convenient so to do; and that they my said trustees, or the trustees or trustee for the time being, do and shall stand possessed of, and interested in, all such new or other stocks, funds, or securities, upon such and the same trusts, and for such and the same intents and purposes, and with, under, and subject to such and the same powers, provisos, declarations, and agreements as are hereinbefore declared or contained, concerning the stocks, funds, or securities, from the sale or transfer whereof such new stocks, funds, or securities respectively shall arise, or such of them as shall be then subsisting or capable of taking effect. Provided also, and my will further is, and I do hereby declare, that if my said trustees, or either of them, or any of their respective executors or administrators, or any future trustee or trustees to be appointed in the stead or place of them, or any of them as hereinafter is mentioned, or any of their respective executors or administrators, shall die, or be desirous of being discharged from, or decline to act, or become incapable of acting, in the execution of the trusts hereby in them reposed, or any of them, then and in such case, and when and so often as the same shall happen, it shall and may be lawful to and for my said daughter M. E. L., by any writing or writings, under her hand and seal, (but having the consent of my said wife J. S., if living) to nominate and appoint any other person or persons to be a trustee or trustees in the stead and place of the trustee or trustees so dying, or desiring to be discharged, or declining or becoming incapable of acting as aforesaid, and that when and so often as any new trustee or trustees shall be so nominated or appointed as aforesaid, all the trusts, monies, stocks, funds, securities, and premises, which shall be

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Clauses for changing trustees, and for their safety and indemnity.

No. 11.

then vested in the trustee or trustees so dying or desiring to be discharged, or declining to act, or becoming incapable of acting as aforesaid, either solely, or jointly with any other trustee or trustees, shall be thereupon with all convenient speed assigned and transferred in such sort and manner, and so as that the same shall and may be legally and effectually vested in the surviving or continuing trustee or trustees of the same trust monies, stocks, funds, securities, and premises, and such new or other trustee or trustees; or if there shall be no continuing trustee of the same, then in such new trustees only, upon the same trusts and for the same intents and purposes as are hereinbefore expressed and declared of and concerning the same respectively, or such of them as shall be then subsisting or capable of taking effect; and that all and every such new trustees shall and may in all things act and assist in the management, carrying on, and executing of the several trusts herein expressed and contained, as fully and effectually to all intents and purposes, as if he or they had been originally appointed in and by these presents, or as the trustee or trustees, in or to whose place he or they shall succeed, might have done if living, and continuing to act in the execution of the said trusts. And I do appoint my said executors to be the guardians of my several grand-children, and of my said natural son J. S., during their respective minorities. And my will further is, and I do hereby declare and direct that my said executors and trustees, and such new trustees as may be appointed in pursuance of the power hereinbefore contained, and each of them, their and each of their executors, administrators, and assigns, shall be charged and chargeable only with and for so much of the said trust monies, and premises as they respectively shall actually receive; and that one of them shall not be answerable or accountable for the others or other, or for the acts, receipts, neglects, or defaults of the others or other of them, but each of them only for his own acts, receipts, neglects, or defaults; nor shall they, or any of them, be answerable or accountable for any banker, broker, or other person with whom or in whose hands any of the said monies may be placed for safe custody or otherwise, in the execution of any of the said trusts, nor for the insufficiency or deficiency of any stocks,

funds, or securities, in or upon which any of such monies may be invested, in pursuance of and in conformity to this my will, nor for any other misfortune, loss, or damage, which may happen in the execution of the aforesaid trust, or otherwise in relation thereto, unless the same shall happen by or through their own wilful defaults respectively. And also that they my said trustees and executors, and such new trustees as may be so hereafter appointed as aforesaid, and each and every of them, their and each and every of their executors, administrators, and assigns, shall and may out of the monies, which shall come to their respective hands, by virtue of the trusts aforesaid, retain to and reimburse himself and themselves, and allow to his and their co-trustees and co-trustee, all costs, charges, and expences which they or any of them may respectively sustain, expend or be put unto, in or about the execution of the trusts aforesaid, or in anywise relating thereto. And lastly, I do hereby revoke all former and other wills by me at any time heretofore made.

No. 12.

A Will equally dividing the testator's whole substance between his two sons, being his only children, subject to a provision for his widow.

THIS is the last will and testament of me, H. L. C. of ———, &c. Esq.; my soul I humbly recommend (1) to the

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(1) Of late years it has been the fashion, for there is a fashion even in the last acts of a man's life, to omit these solemn preambles. I confess myself an approver of them, as believing it to be useful

No. 12. mercy of Almighty God, and I desire that my body may be interred without any unnecessary pomp or expence, in such spot as my executors may think convenient and proper for that purpose. In the first place, I charge all my estate and effects, of every description, with the payment of my debts, funeral and testamentary expences and such legacies as I shall hereinafter bequeath; and subject thereto, I give, devise, and bequeath unto my friends R. and S. all my messuages, farms, lands, estates, and hereditaments, with the appurtenances, wheresoever situate; and also all my personal estate and effects whatsoever and wheresoever, to and to the use of them the said R. and S., their heirs, executors, admi-

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to the surviving relatives of the testator to draw their attention to the tremendous consequences of the separation of soul and body, at a season of impressibility and reflection.

A gentleman has put into my hands a will of one of the Judges, made just after the restoration, the preamble of which seems to me to be affecting and interesting.

In the name of God, Amen, I, Thomas L., of, &c. one of the Barons of his Majesty's Court of Exchequer, finding myself oppressed with many infirmities of body, through age and suffering in these latter times, which puts me in remembrance that I have no long time to continue in this life, and that it is my duty to settle and dispose of that small remainder of estate which it has pleased God in his mercy and goodness to preserve to me, when so many virtuous men have lost all their possessions through the calamities of these unhappy times, do make this my last will and testament; first I commend my soul to the Lord of life, trusting that through the merits and satisfaction of his Son I shall obtain pardon for my many transgressions; and that having finished these days of misery and mortality, I shall inherit everlasting quiet; and I give my body to the earth, whereof it was made, to be decently interred, without any superfluous charge or expence, in humble hope that it will rise a glorious body at the general resurrection.

By the following extract from the will of the late Mr. Burke, it will be seen that his sentiments on this point coincided with those above expressed.

"First, according to the ancient, good, and laudable custom, of "which my heart and understanding recognize the propriety, I be-

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nistrators, and assigns, for ever, upon the trusts, nevertheless, and to and for the intents and purposes, and with, under, and subject to the several powers, provisos, limitations, and declarations hereinafter limited, expressed, and declared, of and concerning the same respectively, (that is to say) upon trust, that they or the survivor of them, or the heirs, executors, administrators, or assigns of such survivor, as long as they or he shall continue to receive the rents, issues, and profits, of any of my said houses, tenements and hereditaments, under the dispositions of this will, or any of them, do see that the same are kept in all substantial and necessary repair, and that the same or such as have usually been insured from damage by fire, be still kept insured to such value and amount as has been usual with regard to the same respectively, taking care that the expence of such repairs or insurances fall respectively upon the person or persons beneficially interested in the same under the provisions of this my will, and that in case any such loss or damage shall happen, that the money to be received upon or by means of such insurance or insurances, may be laid out in reinstating the same respectively, and do retain and apply so much of the rents and profits aforesaid, as shall be necessary in that behalf respectively; and subject and without prejudice to such the aforesaid trusts, upon trust, out of so much of the said rents and profits of all my said messuages and tenements as shall remain unapplied to the purposes aforesaid, and out of all the rest of my estates and effects hereinbefore devised and bequeathed to pay unto my wife E. C., or to such person or persons as she shall, by writing under her

Testator gives all his property to trustees.

Upon trust out of the rents and profits of his messuages and hereditaments to keep them in good repair and insured from fire.

And to lay out the money received upon the insurances in reinstating the premises destroyed or damaged.

Then to pay an annuity to his wife, to be

"queath my soul to God, hoping for his mercy through the only "merits of our Lord and Saviour Jesus Christ. My body I desire "if I should die in any place very convenient for its transport thither (but not otherwise) to be buried in the church, at Beaconsfield, near to the bodies of my dearest brother and my dearest "son, in all humility praying that, as we have lived in perfect "unity together, we may together have a part in the resurrection of "the just."

No. 12. hand, appoint to receive the same, the yearly sum of 700*l.* of lawful money of Great Britain, as long as she shall live and continue my widow; and if she shall marry again, the said annuity of 700*l.* is to be reduced to 300*l.* of like lawful money; the said annuities of 700*l.* or 300*l.* as the case may happen, to be paid half-yearly by equal payments on every 24th day of June, and 25th day of December in every year, and a proportionate part of such half-yearly payment (if any) as shall be accruing, and not have actually accrued due, at the time of her decease. The first payment of the said yearly sum of 700*l.* to commence and be made to her on the first of those days which shall happen after my decease, and the first payment of the said yearly sum of 300*l.* to begin and take place on the first of those days which shall happen after such subsequent marriage of my said wife. And my will is with respect to the last-mentioned annuity or yearly sum of 300*l.*; that the same may be paid into the hands of the said E. C., or unto such person or persons as she shall appoint, exclusively of any such after-taken husband, who is not to intermeddle therewith, nor is the same or any part thereof to be subject in any manner to such husband's control, debts, or engagements. And I will and declare that the receipts of my said wife, or of such person or persons as she shall appoint to receive the said annuity, or the arrears thereof, shall, notwithstanding any such coverture, be good and effectual releases and discharges for the same or so much thereof as shall therein be expressed to have been received. And I further desire that my said trustees, or the trustees or trustee for the time being, out of the rents, issues, profits, and proceeds of all my said estates and effects, real and personal, but subject to all and every the trusts aforesaid, and to the annuity hereinbefore directed to be paid to, or to the appointment of, my said wife, do and shall pay unto my sister G. C., widow of, &c. or to such person or persons as she shall, by writing under her hand appoint to receive the same during her life, the yearly sum of 50*l.* of lawful money of Great Britain, by equal half-yearly payments, on the 24th day of June, and the 25th day of December, in every year, the first payment to commence and be made on the first of

reduced on her marrying again.

And such reduced annuity to be paid to her exclusively of her husband, and not to be subject to his debts or engagements.

To pay other annuities.

No. 12.

those days which shall take place after my death; and also do and shall out of the same rents, issues, profits, and proceeds, but subject and without prejudice to the aforesaid trusts, and to the said annuities, pay unto my niece C. L., or unto such person or persons as she shall, by writing under her hand, appoint to receive the same, during her life, the yearly sum of 70*l.* of like lawful money, by like half yearly payments, and the first payment thereof to be made on the same day as before-mentioned in respect to the annuity given to my said sister G. C., and subject to the several trusts and annuities aforesaid, do and shall stand and be seised and possessed of all and every my aforesaid real and personal estate so devised and bequeathed to my said trustees as aforesaid, upon the trusts following, (that is to say) as to my said hereinbefore-mentioned hereditaments and premises, situate at L. in the county of K., and at B. and C., in the county of R. for the sole benefit of my eldest son T. C., his heirs and assigns for ever. And as to all the residue of my property hereinbefore devised and bequeathed as aforesaid, in trust for the sole benefit of my son J. C. his heirs, executors, administrators, and assigns, for ever. And I do hereby authorize and request the said trustees or trustee for the time being, so to pay and provide for the payment of the said several annuities hereinbefore made payable out of my general property as before-mentioned, as that the beneficial shares of my said two sons T. C., and J. C., be made contributory to and onerated with such payments in equal proportions, or as nearly equal as circumstances will permit, or can conveniently be done; and for facilitating such purpose and the general objects of my will, to keep separate accounts of the rents, profits, and proceeds of the said beneficial shares. And I do hereby also direct, that until my said sons shall respectively attain the age of 24 years, my said trustees or trustee for the time being, shall receive all the rents, profits, and proceeds of all my said estates, property, and effects, and out of the surplus which shall remain in their hands after discharging the said trusts and paying the said annuities, and all arrears thereof, pay and allow out of their said respective beneficial shares for the maintenance and education of my said sons, until they respectively shall attain the

And, subject to such trusts as aforesaid, to stand seised of the said estates and effects upon trust, as to certain premises, for the use and benefit of his eldest son, and as to all his other estates and effects, for the use and benefit of his younger son.

To contribute equally to the said annuities.

Separate accounts to be kept of the distinct shares.

Provision for the education

No. 12. age of 21, any annual sum, not exceeding 200*l.* per annum, and after they shall have attained the age respectively of 21 years, and until they shall respectively have completed the 24th year of their age, any annual sum, not exceeding 300*l.* according to the opinion of their guardians, of the wants of their respective situations. And I hereby appoint my said wife, E. C., together with the said R. and S., the guardians of my said children, and commit wholly to them, and their love and prudence, the education and management of my said two sons, only that to either or each of my said sons, electing to pursue one of the three learned professions, divinity, law, or physic, and with their or his own consent and express inclination, fixed as a student in either of our two English universities, I request my trustees or trustee, for the time being, to advance and pay over and above such suitable allowance as aforesaid, the gross sum of 100*l.* in order to enable him or them to purchase a competent collection of books, which sum of money I request the said guardians of my said children, to see laid out in the purchase of such books only, as are proper and safe to be perused and studied by them. And I desire it to be understood to be my wish and desire, that my said sons should follow liberal and learned professions, and receive an academical education at the university of Oxford or Cambridge. And I declare my will to be, that my said sons, as and when they shall severally have attained the age of 24 years, shall respectively become entitled to receive the entire rents, profits, and proceeds of their respective shares of the said trust property, to which they will be entitled, under and by virtue of this my will, subject, and without prejudice to the interests, charges, annuities, and trusts hereinbefore mentioned. And I do hereby direct that as and when my said sons shall severally have completed the said age of 24 years, if the said several annuities hereinbefore bequeathed shall, previous to that time have ceased to become payable, or as soon after their severally attaining that age as the aforesaid annuities shall cease to become payable under this my will, the said R. and S., or the survivor of them, or the heirs, executors or administrators of such survivor, shall convey, assign, transfer, pay and make over, by proper and effectual

and support of his two sons, out of their respective shares.

Their education confided to their mother and trustees, who are appointed guardians.

The universities and learned and liberal professions recommended.

No. 12.

conveyances, transfers, payments, and assurances in the law, to such of my said sons as shall have so completed the 24th year of his age, all the legal estate and interest of and in his share of the surplus of my said real and personal property, estate, and effects, remaining after the discharge of the aforesaid trust, and payment and satisfaction of the said several annuities, charges, and allowances, in the manner hereinbefore mentioned. And furthermore, my will is, that when, and as soon as either of my said sons shall have completed the 24th year of his age, if he shall consent to give such security, and execute such deeds and assurances, as to the satisfaction of the said trustees or trustee, for the time being, shall sufficiently bind and secure the regular payment of his proportional contribution towards the said several annuities hereinbefore bequeathed, the legal estate of and in the said several species and kinds of property, constituting such his said share above given to him, or intended so to be, (subject, and without prejudice to any of the hereinbefore mentioned beneficial interests and charges,) shall forthwith be transferred and made over to him, his heirs, executors, administrators and assigns, absolutely for ever. And I do hereby further declare my will to be, that if either of my said sons shall happen to depart this life, before he shall attain 24 years of age, (2) and without having been married, all his aforesaid

And when the sons shall have attained 24, then upon their giving security for the payment of the annuities, their shares to be conveyed to them absolutely.

In case either dies before 24, his share to survive.

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(2) If real or personal property be given to A., and if A. die before a certain age, then to B., upon A.'s dying before the age mentioned, in the life of the testator, the devise or bequest does not lapse, but will operate immediately on the testator's death, for the benefit of B. Northey, *v.* Strange, 1 P. Wms. 342. Upon the same principle of construction, where property is given to several persons, as tenants in common, the clause, extending the bounty to survivors, is of use to prevent a lapse; and the word survivors will not make the interest a joint tenancy, if the intent to make a tenancy in common appear by the will; thus, if the devise be to A., B., and C., to be *equally divided between them*, and the survivors and survivor of them, it is a tenancy in common, by virtue of the words equally between them, and the words *survivors and survivor of them*, are to be understood of such of them as shall be living at the testator's death. See 1 P. Wms. 7. note.

Of the interest of the devisee in remainder, where the devisee for life dies before the testator.

The limitation over to the survivors, after a devise to persons as tenants in common, prevents a lapse.

No. 12. beneficial estate and interest, given to or intended for him by this my will, remaining after the full discharge of such payments and arrears, as are hereby charged upon the same, or the same is hereby in anywise made liable to, and subject to such of them as shall still be payable thereout, or charged thereupon, shall go and belong to the surviving brother, and be subject to such and the same provisos, restrictions, and powers, to which all my said property and effects have hereinbefore been made liable. And in case both my said sons shall depart this life before they shall attain the 24th year of their age, and unmarried, my will is, that the said R. and S., or the survivor of them, or the heirs, executors, and administrators of such survivor, do and shall, with the consent of the said E. C., if she be then living, and if she be dead, of their or his own proper authority, sell and dispose of all the said property hereinbefore devised to them, both real and personal, either together, or in parcels, by public auction, or private contract, for the best price or prices in money, which can be reasonably obtained for the same, and convey the same accordingly. And I will and declare, that the receipt, or receipts, of my said trustees, or the trustees, or trustee, for the time being, shall be a sufficient discharge, or discharges, to the purchaser or purchasers thereof, or of any part thereof, for the money for which the same, or any part thereof, shall be so sold as aforesaid, and such purchaser, or purchasers, his, her, or their heirs, executors, administrators, or assigns, or any of them, shall not be answerable for any loss, non-application, or misapplication of such purchase-money, or any part thereof. And I give and bequeath the money arising from such sale or sales, to the said R. and S., their executors, administrators, and assigns, upon trust that they, or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall place out and invest the same in or upon any of the parliamentary stocks or funds of Great Britain, and do and shall vary and transpose such stocks for other securities of the like nature, when and so often as it shall seem meet to them, and do and shall pay the interest and dividends of the same unto my said wife E. C., as long as she shall live, or to such person or persons as she shall appoint to receive the same, and from

And in case both sons shall die before 24, the trustees are to sell all the trust estates and effects, and vest the produce in the funds, and stand possessed thereof upon trust, to pay the interest and dividends to his wife for life, and after her death, to transfer and pay the principal to such persons, in such shares, &c. as testator shall appoint, and in default of appointment to and among testator's next of kin.

No. 12.

and immediately after her decease, upon trust, that they, the said trustees, or the trustees, or trustee, for the time being, do and shall pay or transfer all such principal monies, stocks, funds and securities, unto such persons, in such parts, shares, and proportions, at such days and times, and with, under, and subject to such powers, restrictions, limitations over, and conditions, as I may hereinafter direct or appoint in any future will, codicil, testamentary paper, or other writing under my hand; and in case I shall make no such direction or appointment in respect thereof, or shall dispose only of part thereof, then my will is, that my said trustees, or the trustee for the time being, do and shall dispose of all such the said principal monies, stocks, funds and securities, or so much thereof as shall remain unappointed and undisposed of by me, by any subsequent will or codicil, or testamentary paper, or other writing as aforesaid, to and amongst my nearest kindred, precisely in the manner in which the statute made for the distribution of intestates' effects, would have disposed of my personal property in case of my dying wholly intestate. And I give to the said R. and S., whom I also constitute and appoint executors of this my last will and testament, full power, with the privity, consent, and approbation of my said wife, if she shall be living, and if she shall be dead, then of their own authority to sell and dispose of any part of my said personal estate and chattels real, for the most money that can be obtained for the same, if they shall deem such sale or disposal to be for the benefit of my said personal estate, until my said son, J. C., who is to become entitled thereto under this my will, shall have attained his age of 24 years. And I request them, as such executors, to call in any debts due to me upon bond, or otherwise, but so nevertheless as to give a reasonable time to my bond debtors to discharge the same respectively, provided the interest be regularly paid, and the principal be not immediately wanted for the purposes and provisions of this my will, or some, or one of them. And my will is, that all such part of my personal estate, and the growing proceeds thereof, as likewise the rents, issues, and profits, of all my real and leasehold estates, remaining in the hands of my said trustees, or the trustee, for the time being, after discharging

Trustees empowered to sell and dispose of any part of the personal estate which it may appear to them to be for the benefit of the younger son to dispose of, until he shall have attained the age of 24, and have the full possession of his share under the will.

The proceeds to be laid out in stock, to accumulate till the son is entitled.

No. 12. all the said several trusts, and keeping down the said several annuities above granted, as shall not be wholly in the disposition of one of my said sons, by virtue of the beneficial estate and interest hereinbefore given to him, until the same shall be in the actual possession and disposition of my said sons respectively, by virtue of the provisions of this my will, or some or one of them, shall be invested and laid out in the purchase of stock, in such of our public and parliamentary funds, as the said trustees, or trustee shall think most advantageous and desirable, and be permitted, and caused to accumulate in the nature of compound interest, until the capital shall, by virtue of some or one of the aforesaid provisions of this my will, be respectively transferable to the persons beneficially entitled to it, under the above dispositions, for the benefit of such his estate and interest; provided always, that the said trustees, or trustee, as aforesaid, do and shall keep distinct and separate accounts of the stock so to be purchased as aforesaid, so as to correspond with, and relate to the distinct titles and shares of my said sons, under my will as aforesaid. And I further desire and direct, that if either of my said sons, having completed the 21st year of his age, shall be in treaty for a marriage, becoming his condition, education, and family, and such as shall be fully approved of by my said wife, if she be then living, and the other guardian or guardians appointed by this will, and if such guardians shall be then all dead, by the said trustees, or trustee, for the time being, he may be enabled, notwithstanding he may be under the age of 24, by the said trustees, or trustee, to make a suitable legal settlement of all or some part of his share of the real or personal property to which he will be entitled, under this my will, upon such intended marriage, the terms and provisions of which settlement shall be in his own discretion: provided only that he enters into such bonds and covenants, and executes such reasonable other assurances, as shall be deemed by the said trustees, or trustee, as aforesaid, sufficient to bind and secure to the persons entitled to any annuities or benefits out of, or charged upon his said share or division of my testamentary property, the full and regular payment and satisfaction thereof. And it is my will, that upon such marriage,

If either of his sons shall be in treaty for a suitable marriage before 24, with the consent of his mother and guardians, trustees are to enable him to make a suitable settlement.

with such consent, and at such age as aforesaid, of either of my said sons, he shall have all the benefit and privileges which have hereinbefore been provided for him on his attaining the age of 24; and that the whole property given to him by this my will, shall, upon the said annuities and charges being secured, as aforesaid, ultimately and absolutely vest in him, discharged of the said contingency of survivorship in the other brother. And I declare my will to be, that if my said wife, E. C., shall insist upon receiving her jointure of 300*l.* per annum, which was settled upon her by our marriage settlement, bearing date the 19th day of February, 1772, and secured by way of rent charge upon some of the hereditaments and premises above devised to my said trustees, upon the trusts hereinbefore-mentioned, she shall take no benefit under this my will; but the same, as far as respects any provision for her, or disposition in her favour, shall be void, and of no manner of effect: and in the event of her attempting to enforce her claims to such jointure, or any part thereof, by any of the powers or remedies given to her, or her trustees, by the said settlement for that purpose, I do direct, that in every such case the trustees, or trustee, for the time being, under this my will, do and shall, instead of paying to my said wife the annuity, or annuities, hereinbefore provided for her, or any part thereof, make such disposition of the rents and profits of my said estates, hereby devised to them, and which they are hereby empowered to receive, as that my eldest son, for whose share the estates charged with the said jointure are hereinbefore intended, may receive a complete indemnification, and the just proportion between my two sons, as to the benefit to be derived to them, under this my will, may be equally preserved and maintained. [The proper clauses for the safety and indemnity of the trustees.]

If testator's wife should claim her settled jointure then she is to take no benefit under the will.

And, lastly, I do hereby solemnly revoke all former wills and testaments at any time heretofore by me made, and declare this only to be my last will and testament.

No. 13.

A Will, comprising directions for a Settlement of freehold, copyhold, and leasehold estates, with various limitations and provisos, by way of annuities and rent charges; containing also various bequests of chattels, and sums of money.

I, J. W., of ———, do make this my last will and testament, in manner and form following: I desire to be decently interred at ———, at the discretion of ———, my executors hereinafter named; and I give and bequeath unto my wife, A., all my household goods and furniture, plate, jewels, watches, linen, china, pictures, books, and wearing apparel of what nature or kind soever, as well at my town residence, as at my residence at ——— aforesaid; and also all my coach-horses, saddle-horses, coach, chaise, and other carriages, and the harness, saddles, bridles, furniture, and other things belonging, and appurtenant thereto, together with the live and dead stock, farming utensils, and implements of husbandry whatsoever, which shall be at, in, or upon, or about my estate at ——— aforesaid, at the time of my decease, to and for her own proper use absolutely, for ever; also I confirm to her, my said wife, the surrender made to her use, for life, of my copyhold estate at ———. And I do hereby give and devise unto her, my said wife, all my freehold estate, with the appurtenances at ———, and ——— aforesaid, to hold the same to and for the use of her, my said wife, A., and her assigns, for and during the term of her natural life, (if she shall so long continue my widow,) she keeping the same in repair, and

His furniture, plate, pictures, books, &c. to his wife absolutely.

Confirms an estate before settled upon her, and adds a further life-estate on other premises.

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paying the quit rents (if any) and taxes: and I give to her, during the continuance of her respective estates, full power to grant leases of the said freehold premises, and also of the said copyhold premises, so far as the custom of the manor will allow, for any term or terms, not exceeding three years, in possession, and not in reversion, so as the best improved rents be reserved incident to the reversion, without taking any fine, and the lessees be not made dispunishable for waste, and so as there be contained therein a proviso for re-entry for non-payment of the rents thereby reserved, and so as such lessees do execute counterparts of such leases, and covenant for the due payment of such rents. And as to, for, and concerning the remainder or reversion of the said copyhold estate, so surrendered to the use of my said wife for her life, expectant on her decease; and as touching and concerning the said freehold premises hereinbefore given to her during her widowhood, from and immediately after her decease, or second marriage, which shall first happen, and also as to, for, and concerning all other my manors, messuages, farms, lands, tenements, and hereditaments, situate and being in the said county of ———, and in the counties of ——— and ———, or elsewhere, freehold, copyhold, and leasehold, whether in possession, reversion, remainder, or expectancy, whereof I have power to dispose, I give, devise, and bequeath the same, and all my estate and interest therein respectively, unto and to the use of my wife, A., and my friends ——— and ———, according to the nature of the same estates respectively, upon the trusts, nevertheless, and for the intents and purposes, and with, under, and subject to the powers, provisos, and declarations hereinafter expressed and declared of and concerning the same respectively, (that is to say) upon trust, that they, the said trustees, or the survivor or survivors of them, or the heirs, executors, administrators, or assigns of such survivor, do and shall, by sale or mortgage, demise, or other disposition of the several estates and premises, or a competent part thereof, or by, with, and out of the rents, issues and profits to arise therefrom in the mean-time, or by all or any of the aforesaid, or by such other ways and means as to them, him, or her shall seem meet, raise and levy such sum or sums of money as shall

With a power of leasing.

All the residue of his estates, of all kinds to trustees.

To raise, by sale or mortgage, such sums as shall be sufficient to make good any deficiency of the personal estate, in paying the legacies, debts, &c.

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be sufficient to make good the deficiency of my personal estate, not specifically bequeathed, in answering and satisfying my debts, legacies, annuities, and funeral and testamentary charges: and for facilitating such sale or sales, mortgage or mortgages, I will and declare, that the receipt or receipts of the said ——— and ———, or the survivors or survivor of them, or the heirs, executors, administrators or assigns of such survivor, shall be a sufficient discharge or discharges for the purchase or mortgage money, agreed to be paid or advanced either by way of purchase or loan, for or upon my said several estates and premises, or any part or parts thereof respectively; and the person or persons paying or lending the same, his, her, or their heirs, executors, administrators or assigns, shall not be liable to answer any loss, misapplication, or nonapplication thereof respectively:

Their receipts to be discharges.

and, subject and without prejudice to the aforesaid trust, I will and direct that the said trustees, or trustee for the time being, do and shall stand, and be seised and possessed of my said several freehold, copyhold, and leasehold estates and premises, or so much thereof respectively, as may remain unsold, upon the following trusts, (that is to say) as to my freehold estates and premises, upon trust, to convey, settle, and assure the same, subject to any such mortgage or mortgages as may be so made as aforesaid, to the uses hereinafter-mentioned, or so many of them as at the time of such settlement shall be subsisting or capable of taking effect, that is to say, to the use, intent, and purpose that my said wife may receive thereout one annuity or yearly rent-charge of ——*l.* clear of all taxes and without deduction, for her life, to and for her own sole and separate use and benefit, (over and above all other provisions which I have made for her) but, nevertheless, I do hereby declare, that the provisions hereby made or intended for and in trust for my said wife, shall be accepted by her as and for her jointure, and in lieu and full satisfaction of all dower and thirds, or free bench to which she is, can, or may, or otherwise might be, entitled out of all or any of my estates at the common law, or by custom:

To remain seised and possessed of such and so much of the said estates as should not be sold for the said purposes, upon trust, to convey and settle the same to the uses after-mentioned, viz. to the intent that his wife may receive an annuity over and above the provisions already made for her, to be in lieu of dower.

and to the use and intent that B., the wife of ———, may receive one annuity or clear yearly rent-charge of ——*l.* for her life, clear of taxes and without deductions,

To the use and intent that B. may receive an annuity of ——*l.*

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for satisfaction of the like yearly sum to the payment of which to her, I am liable: and to the use and intent that my said trustees and their heirs may receive thereout, upon the trusts hereinafter expressed, the following annuities or yearly rent charges, clear of taxes and without deductions, for the life of Jane W., daughter of ———, that is to say, so long as she shall be under the age of 21 years, and unmarried, the clear annuity or rent-charge of ——*l.* and after she shall attain the said age, then the clear annuity or rent-charge of ——*l.* so long as she shall continue unmarried, and after her marriage, the clear annuity, or yearly rent-charge of ——*l.* for the remainder of her life; in trust, to apply the said annuity or rent-charge of ——*l.* during its continuance, for or towards her maintenance and education, the said annuity of ——*l.* during its continuance, to her for her absolute use, and that of ——*l.* during its continuance into her proper hands, or to her appointee or appointees in writing under her hand, to the intent that the same may be for her sole and separate use, exclusively of her husband for the time being, and may not be subject to his power or control, debts, or engagements, and for which the receipts of her, or her appointee or appointees, shall be effectual discharges, notwithstanding her coverture. And to the use and intent that the several other persons hereinafter named may receive out of the same premises the several annuities or yearly rent-charges hereinafter-mentioned, for their respective lives, clear of taxes and without deductions, that is to say, my sister, J. R., one annuity or yearly rent-charge of ——*l.* for her life; H. D. (husband of my late sister, M. D.) one annuity or yearly rent-charge of ——*l.* for his life; my niece M. A. (daughter of my said late sister) one annuity or yearly rent-charge of ——*l.* for her life; my niece E. B. (daughter of my late sister E. S.) one annuity or yearly rent-charge of ——*l.* for her life; E. B. (son of my said niece E. B.) one annuity or yearly rent-charge of ——*l.* for his life; my niece J. M. (the wife of T. M.) one annuity or yearly rent-charge of ——*l.* for her life; my niece I. M. (the wife of J. M.) one annuity or yearly rent-charge of ——*l.* for her life; E. B. (my wife's brother) one annuity or yearly rent-charge of ——*l.* for his

And to the further use and intent that the trustees may receive an annuity for the life of J. W. (that is to say) during her minority ——*l.* from that time till marriage ——*l.* and after her marriage ——*l.*; to apply the said annual sum of ——*l.* during its continuance for her maintenance; the second sum of ——*l.* during its continuance to be paid to her for her absolute use, and the third sum of ——*l.* to be paid to her for her separate use, exclusively of her husband.

And to the use and intent that the several other persons after-named, may receive the several annuities or rent charges after-mentioned for their respective lives, (that is to say)

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that J. R. may receive, &c.

life; A. B. (my wife's sister) one annuity or yearly rent-charge of ——*l.* for her life; E. A. (daughter of N. J. deceased) one annuity or yearly rent-charge of ——*l.* for her life; E. W. (my late housekeeper) one annuity or yearly rent-charge of ——*l.* for her life; and J. P. one annuity or yearly rent-charge of ——*l.* for his life; all the said several annuities or yearly rent-charges hereinbefore directed to be paid out of, and charged upon, the said estates and premises in such settlement to be comprised, to be paid to the said annuitants respectively, by equal quarterly payments, (that is to say) on the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December in every year; the first quarterly payment of the said annuities respectively to begin and be made on the first of the said quarter days that shall happen next after my decease, with powers of distress and entry upon, and perception of the rents and profits of the same premises, to be limited and reserved to the said several annuitants in the usual manner, for better securing and compelling the payment of the said several annuities or yearly rent-charges.

And subject thereto, and to the powers and remedies for recovery thereof, to the use of testator's son and sons successively in tail male, remainder to his daughters as tenants in tail with cross remainders.

And as to the said estates and premises so to be charged, and subject thereto, and to such powers and remedies for recovery thereof as aforesaid, to the use of the first, second, third, fourth, fifth, sixth, and all and every other the son and sons of my body, lawfully issuing, (whether born in my life-time or after my death) severally and successively, and in remainder one after another, as they shall be in priority of birth, in tail male; remainder to the use of all and every the daughter and daughters of my body, lawfully issuing, (whether born in my life-time or after my death) in tail general, to take as tenants in common if more than one, with cross remainders among them as tenants in common if more than one, in like tail general; remainder to the heirs of my body, lawfully issuing; and for default of such issue, to the use of W. W. (son of W. W. late of ———, deceased) and his assigns, for his life, without impeachment of waste; remainder to the use of my said trustees and their heirs, during his life, in trust, by the usual ways and means, to preserve the contingent uses and estates, in such settlement after to be limited, from being defeated or destroyed, but to

Remainder to the heirs of his own body.

Remainder to W. W. for his life, and his children in strict settlement.

No. 13.

permit him and his assigns to receive and take the rents, issues, and profits of the said estates and premises, during his life, to his and their own use; remainder to the use of the first, second, third, fourth, fifth, sixth, and all and every other the son and sons of the body of the said W. W. the son, severally and successively, and in remainder one after another, according to their priority of birth, in tail male; remainder to the use of my said trustees and their heirs, during the life of my nephew J. J. upon the trusts hereinafter declared concerning the same; remainder to the use of the first, second, third, fourth, fifth, sixth, and all and every other the son and sons of the body of my said nephew J. J. severally and successively, and in remainder one after another, according to their priority of birth, in tail male; remainder to the use of my said trustees and their heirs, during the life of my said niece, J. M. upon the trusts hereinafter declared concerning the same; remainder to the use of the first, second, third, fourth, fifth, sixth, and all and every other the son and sons of the body of the said J. M., severally and successively, and in remainder, one after another, according to their priority of birth, in tail male; remainder to the use of the said trustees and their heirs, during the life of L. W., upon the trusts hereinafter declared concerning the same; remainder to the use of the first, second, third, fourth, fifth, sixth, and all and every other the son and sons of the body of the said L. W. severally and successively, and in remainder, one after another, according to their priority of birth, in tail male; remainder to the use of the said trustees and their heirs, during the life of J. L., upon the trusts hereinafter declared concerning the same; remainder to the use of the first, second, third, fourth, fifth, sixth, and all and every other the son and sons of the body of the said J. L., severally and successively, and in remainder one after another, according to their priority of birth, in tail male; remainder to the use of my trustees and their heirs, during the life of my said sister, J. T., upon the trusts hereinafter expressed and declared of and concerning the same; remainder to the use of all and every the daughters and daughter of the said J. T. lawfully begotten, or to be begotten, and of all my said

Remainder to the use of the trustees, during the life of J. J. upon the trusts after mentioned, and to the children of J. J. in succession in tail male.

Same limitations to others and their families.

No. 13. brothers and sisters, lawfully begotten or to be begotten, in tail general, to take as tenants in common, if more than one, with cross-remainders among them as tenants in common, in like tail general; remainder or reversion to the use of my own right heirs. And as to the several and particular uses and estates hereby directed to be limited in such settlement, in remainder to the said trustees and their heirs, during the respective lives of the said J. J., J. M., L. W., J. L., and J. T., such uses and estates shall therein be declared to be so limited to the said trustees and their heirs, during the continuance of the same respectively, in trust, not only to preserve by the usual ways and means, the several contingent remainders therein to be limited, but to manage and improve the said estates and premises, in such manner as to them the said trustees, or the trustees or trustee for the time being, shall seem meet, and to receive the rents, issues, and profits thereof, and to pay or apply the same, or so much thereof as shall remain, after retaining or discharging the expences of repairs and improvements, and all taxes and other necessary outgoings, and the poundage, salaries, or wages of such person or persons, agent or agents, as they, he, or she may think fit to appoint or employ, to oversee, manage, and improve, and receive the rents, issues and profits of the said premises, to or for the benefit of such person or persons, as for the time being shall, under the limitations in such settlement, be entitled to the next estate, of and in the said manors and premises therein comprised, expectant on the particular use or estate, for the time being, vested in possession in my said trustees or their heirs, in trust as aforesaid, but subject to a proviso to be inserted in such settlement, that if the person or persons for the time being, entitled to such next estate, or any of them, be a minor or minors, and unmarried, then during the period that such person or persons, or any of them, shall be a minor or minors, and continue unmarried, such part of the net rents, issues, and profits of the said premises as such unmarried minor or minors would be entitled to, if he, she, or they was or were married, or adult, shall be disposed of by the said trustees or trustee for the time being, in the following manner, that is to say, any such yearly sum or

And as to the uses and estates directed to be limited in such settlement to the said trustees, during the lives of the said J. J., J. M., L. W., J. L. and J. T. in trust, not only to preserve the contingent remainders therein to be limited, but to manage and improve the estates for the benefit of the persons next entitled.

Directions for the disposal and application of the

No. 13.

sums, or such part thereof, as they, he, or she, in their, his, or her discretion shall think necessary, not exceeding ——*l.* per annum, shall be applied for or towards the maintenance and education of such minor, or for each of such minors, if more than one, until he or she shall attain the age of fourteen years, and after that age, and until he or she shall attain the age of eighteen years, or shall be married, any yearly sum or sums, not exceeding——*l.* per annum for such minor, or each such minor, and after the age of eighteen years, and until he or she shall attain the age of 21 years, or be married, any yearly sum or sums not exceeding ——*l.* per annum, for such minor, or each such minor; and the surplus of such net rents and profits as such unmarried minor or minors would, if married or adult, be entitled to, remaining unapplied for the last-mentioned purpose shall, during such period, be considered as constituting part of my residuary personal estate, and be subject to the disposition hereinafter made thereof, and to all the trusts and powers in this my will contained respecting the same. And I will and direct that there shall be inserted in such settlement, a power or proviso enabling the said W. W., as and when he shall be in the actual possession or entitled to the rents, issues, and profits of the said estates and premises so to be settled by deed or will, to grant, limit, settle, or appoint to, or to the use of, or in trust for, any woman or women, whom he shall happen to marry, (and that either before or after such marriage,) for and during the natural life or lives of such woman or women respectively, for her or their jointure or jointures, and in bar of her or their dower, to take effect immediately after his decease, any annual sum or yearly rent-charge, annual sums or rent-charges, not exceeding ——*l.* by the year, tax-free and without any deduction, to be issuing out of, and to be charged and chargeable upon all, or any part of the said estates and premises, with such powers and remedies for recovering the same when in arrear, and to create and limit such term or terms of years, for raising and better securing the same, as to him shall seem meet. And it is also my will, that in such settlement there shall be inserted a power or powers, enabling the said W. W., and also the trustees

rents and profits, in case the persons so next intitled shall be minors.

To apply certain sums for their maintenance, varying with their respective ages.

The surplus of the said rents and profits in the mean time to fall into the residue of testator's personal estate.

Settlement to contain a power for the tenant for life to jointure any woman he may marry.

And also a leasing power.

No. 13. or trustee for the time being under such settlement, as and when they shall respectively be in the actual possession, or entitled to the receipt of the rents and profits, of my said manors, hereditaments, and premises, under the limitations therein contained, and also during the minority or minorities of any such child or children as may be entitled to the freehold and inheritance thereof, under such limitations as aforesaid, to make leases of all or any part of the said premises, for any term not exceeding 21 years in possession, and not in reversion, or by way of future interest, so as there be reserved in every such lease the best and most improved yearly rent, to be incident to the immediate reversion of the premises so to be demised, that can be reasonably had or gotten for the same, without taking any fine, premium or foregift for the making thereof, and so as there be contained in every such lease a condition of re-entry on non-payment of the rent thereby to be reserved, and so as the lessors execute counterparts thereof, and do thereby covenant for the due payment of the rents, to be thereby reserved, and be not made dispunishable for waste. And it is my will, that in such settlement there shall be inserted a proviso, condition, or clause, enjoining the issue male of my said niece J. M. within six calendar months next after such issue male shall come into possession of the said estates and premises, under the limitations in such settlement, to assume, take, and use the surname of W. only, and to write and sign that surname only in or to all acts, deeds, and instruments, and on all other occasions, and for determining the estate tail of such issue, refusing or neglecting to comply with such condition, and limiting the said estates and premises over to those who may be next in remainder expectant on such estate tail, under such settlement, or who would be entitled to the possession of the said premises, under the limitations in such settlement, in case the tenant in tail male so refusing or neglecting, were actually dead, without issue male. And my will further is, that such intended settlement shall contain a proviso that in case any of the trustees therein named, or any succeeding trustee or trustees in their or any of their place or places (whether introduced into the trusts therein contained by nomination or appoint-

Settlement to contain a proviso for obliging the persons taking under the limitations to use the testator's surname.

Settlement to contain a proviso for empowering a change and substitution of

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ment as hereinafter mentioned, or by representation of any deceased trustee or trustees,) shall die, or desire to be discharged from, or refuse or neglect to act, or become incapable of acting in the execution of such trusts, or any of them, it shall be lawful for the surviving, or other trustees or trustee for the time being (whether he, she, or they, may have been created a trustee or trustees, by nomination or appointment, or have become so by representation as aforesaid,) by deed or instrument, under hand and seal, attested by two or more witnesses, to nominate and appoint any other person or persons to be a trustee or trustees in the stead of the trustee or trustees so dying, desiring to be discharged, or refusing or neglecting to act, or becoming incapable of acting as aforesaid; and a clause making the usual provision for vesting the trust estates, real and personal, according to such nomination or appointment, and for giving the same its full effect, and enabling the new trustees or trustee to execute every trust and power which the old trustee or trustees might have done if such appointment had not taken place, either alone or in conjunction with the continuing trustee or trustees (if any) as the case shall happen. And also the usual clause for the indemnity of the trustees or trustee therein named, their heirs, executors, administrators and assigns, and for enabling them to act with safety in the execution of the trusts of such settlement, and such other clauses as are usual in settlements of the like kind. And as to, for, and concerning my said copyhold and leasehold estates and premises, or so much thereof as may remain unsold, for making good the deficiency of my personal estate not specifically bequeathed, in answering my debts, legacies, and funeral and testamentary charges, I will and direct that the said trustees, or the trustees or trustee for the time being, do and shall stand seised and possessed of the same respectively, (subject to any such mortgage or mortgages as may be made thereof as aforesaid,) upon such trusts, and for such intents and purposes as are hereinbefore directed to be limited or expressed, of and concerning the said freehold manors and premises therein to be comprised, and with, under, and subject to such and the same powers, provisos, conditions, limitations, and declarations as are di-

trustees to be made from time to time.

And the usual clauses of safety and indemnity to the trustees.

Trustees to stand seised and possessed of the copyhold and leasehold estates upon correspondent trusts.

No. 13. rected to be contained therein, concerning the same freehold manors and premises, or as near thereto as can or may be, and the rules of law and equity and the different natures of the estates and tenures will admit. Provided, that it shall be lawful for my said trustees, their executors, administrators, and assigns, as and when they in their discretion shall think proper, or see occasion, to renew the lease and leases of all or any part of my leasehold premises, and pay the fines and fees, and other expences necessary to be paid for such renewal or renewals, out of any monies which may be in their hands by virtue of this my will, and to rebuild or repair all or any of the messuages or tenements, to be demised by such renewed lease or leases, (if such renewal shall be obtained on terms of rebuilding or repairing,) and to pay the expences of such repairing or rebuilding, in like manner as I have directed with respect to the expences of such renewals aforesaid; all which renewed leases shall be vested in them the said trustees, their executors, administrators, and assigns, upon the same trusts, and for the same intents and purposes, and with, under, and subject to the same powers, provisos, conditions, and declarations, as are contained and referred to in this my will concerning the present subsisting leases, or the premises therein comprised. Provided, and my will further is, that it shall be lawful for my said trustees, their heirs, executors, administrators, and assigns, in the mean time, until such settlement of my said estates shall be made as hereinbefore directed, to make or grant leases of all my said freehold, and also of my said copyhold and leasehold manors and premises hereinbefore devised to them upon trust as aforesaid, which may be remaining unsold, for any term not exceeding 21 years in possession, reserving the improved rents, and without taking fines, and subject to the like restrictions as are mentioned with respect to leases to be made under the power of leasing directed to be inserted in the said intended settlement, and to appoint such persons as they shall think proper to oversee, manage, and improve my said estates and premises, and to receive the rents, issues, and profits thereof, and to pay or allow to, or permit such overseer or overseers, receiver or receivers, to retain such poundage, or sum or sums of money, by way of salary or wages, as my said trus-

Trustees to renew the leases as and when they shall think proper.

All the renewed leases to be vested in the trustees upon the same trusts.

Trustees to make leases in the mean time until the estates are sold, upon the same terms as above mentioned in respect to the leases to be made under the power for that purpose to be inserted in the settlement.

To appoint persons to oversee and manage the property, and to re-

No. 13.

tees or the trustees or trustee for the time being shall think meet or reasonable. And I give the following legacies, 'that is to say,' to my said wife —*l.* for mourning, and her immediate occasions, and to my other executors and trustees above-named 100*l.* each, as a small acknowledgment for the trouble they will have in the execution of this my will. And I desire my executors to give mourning and one year's wages, (over and above what may be due for wages) to all such my servants as they in their discretion may think proper. And I give to my said nephew J. A. —*l.* to be paid to him at his age of 21; to D. C. —*l.*; to my nephew L. —*l.*; to my niece E. F. —*l.* at and when she shall arrive at her age of 21, or be married; to my nephew T. D. —*l.* at his age of 21, with interest in the mean time; to R. S. and J. F. —*l.* each, at their several ages of 21; and unto each of my nieces A. J. and J. S. —*l.*; unto E. and A. H. —*l.*; unto J. B., H. B. and C. B. children of my niece D. N. —*l.* each; all the said legacies to be paid to the respective legatees within 12 months after my decease, (save and except those given to my said wife, my said trustees and executors, and my servants, which are to be paid immediately after my death). And I give unto the said Sarah S. the daughter of ————, the sum of —*l.* on the day of her marriage; and I give after her decease the said sum of —*l.* unto such child or children of her the said S. S. as shall attain the age of 21 years, to be divided among them (if more than one) in equal shares, and if but one, the whole to go to such one child as shall attain the said age. The portion or portions of such of them as may attain the said age, in the life-time of the said S. S., to be a vested interest or vested interests, though not payable till after her death, and the interest of the presumptive portions of such of her children as may be under the said age at the time of her death, or so much thereof as shall be thought necessary, to be applied for or towards the maintenance and education of such infant child or children, until he, she, or they shall attain the said age; and the surplus dividends, or interest which may not be applied for that purpose to accumulate and go along with the original share or shares; or in case there shall be no such children who shall attain the said age, such accumulations to fall together with

ceive rents, and to allow them proper salaries.

Pecuniary legacies.

To his wife a sum for her immediate occasions.

To his executors for their trouble.

Advance of wages to servants.

Legacies settled.

No. 13. the principal sum into my residuary personal estate. And I give unto J. W. daughter of my said nephew ———, *200l.* but the same not to be vested in or paid to her till she shall attain the age of 21 years, and not to bear interest in the mean time; I give unto J. R. daughter of ———, *500l.* but the same not to be vested in or paid to her till the age of 21 years, and not to bear interest in the mean time; I give unto J. B. eldest son of the said E. ———, whom I have hitherto brought up and taken under my protection, —*l.* over and above what he may participate in the —*l.* hereinbefore given among the children of the said E. ——— , but the same not to be vested in or paid to him till his age of 21 years, and not to bear interest in the mean time; and unto such child or children of my said nephew I. J., (born in his life-time or after his death) as shall attain the age of 21 years, the sum of —*l.* to be divided between or among them, if more than one, share and share alike, and if but one then the whole to such one child as shall attain such age, and not to bear interest in the mean time. And after the decease of my said niece I. M., I give unto such child or children of her, now in being or hereafter to be born, as shall live to attain the said age of 21 years, the sum of —*l.* the same to be divided between or among them (if more than one), share and share alike, and if but one then the whole to such one child as shall attain the said age, and not to bear interest in the mean time, but the portions of such of them as shall attain the age of 21 years in his life-time, shall be vested interests, though not payable until after her death, and after the decease of my said niece I. M. I give the sum of —*l.* to such child or children of her now in being, or hereafter to be born, as shall attain the age of 21 years, the same to be divided between or among them if more than one, share and share alike; and if but one, the whole to such one child as shall attain the said age, and not to bear interest in the mean time; but the portions of such of them as shall attain the said age in her life-time, shall be vested interests, though not payable till after her death. And I give after the decease of the said E., unto such child or children of him the said E., born in his life-time, or after his decease as shall attain the age of 21 years,

—*l.* the same to be divided among them, if more than one, in equal shares, and if but one, the whole to go to such one child as shall attain the said age, and not to bear interest; save that in case of the death of the said E., having a child or children under the age of 21 years, my will is that my said trustees or trustee for the time being shall and may pay and apply any sum not exceeding the sum of 50*l.* per annum, by equal quarterly payments, for and towards the maintenance and education of such infant child or children, until he, she, or they shall attain the age of 21 years. And I will that the portions of such children of the said E. as shall attain the said age of 21 years in his life-time, shall be vested interests, though not payable till after his death. And as a further provision for the said E. B., whom I have hitherto brought up and taken under my protection, I empower my said trustees or trustee for the time being, to apply such sum and sums of money (not exceeding ——*l.* in the whole) for placing out the said E. B., apprentice to some profession or trade as they the said trustees or trustee shall think proper, recommending to his choice the profession of ———, when and so soon as he shall arrive at a proper age for that purpose. And I declare that such sum or sums as may be thought fit to be applied for that purpose, shall be considered as falling under the class of my pecuniary legacies. And I give and bequeath unto my said trustees and executors, the exchequer annuity of —*l.* which I purchased for the life of my said niece I. M. my nominee, in trust, to pay and apply the same as she my said niece, notwithstanding her present or future coverture, shall by any note or writing under her hand, direct or appoint, and in default, at any time, of such direction or appointment, then shall and do pay the same into her proper hands, for her own sole and separate use and benefit, to the intent that the same annuity or any part thereof may not be subject to the debts, power, or control of her present or any future husband; and I declare that the receipt or receipts of her, or of the person or persons to whom she may direct the same to be paid, shall from time to time, notwithstanding her coverture, be a sufficient discharge or discharges for the said annuity, or so much thereof as in such receipt or receipts shall be acknowledged or

No. 13.

No. 13. expressed to be received. And I release to ———, the debt secured to me by his bond, and a judgment thereon, and desire my executors to deliver to him the said bond to be cancelled, and to acknowledge satisfaction on the judgment at his costs. And I give all the goods and fixtures belonging to me, and now at or upon my farms and lands in ———, in the occupation of ———, unto ———, to and for his own use, without any account to be rendered by him to my executors, in respect thereof, which bequest, together with the legacy of ——*l.* hereinbefore given to him, I consider as sufficient, having heretofore amply advanced him. And I give and bequeath all the rest and residue of my personal estate and effects, of what nature or kind soever the same may be, unto my said trustees, their heirs, executors, administrators, and assigns, upon trust, that my said trustees, or the trustees, or trustee, for the time being, do and shall invest the same in the purchase of manors, messuages, lands, tenements or hereditaments, of a clear and indefeasible estate of inheritance in fee-simple, in possession, to be situate or arising somewhere in that part of Great Britain, called England; and do and shall convey, settle, and assure such manors, messuages, lands, tenements, or hereditaments, as may be so purchased, to such and the same uses, upon such and the same trusts, and for such and the same intents and purposes, and with, under, and subject to such and the same powers, provisos, limitations and declarations, as are hereinbefore directed to be limited, expressed or declared in and by such settlement as aforesaid, of and concerning such of the freehold manors, and hereditaments devised by this my will, as are intended to be comprised in the same settlement, or such and so many of them as shall be then subsisting, undetermined, or capable of taking effect.

Residue of the personal estate to be laid out in the purchase of other estates to be settled as before directed concerning the before devised estates.

Provided, and my will is, that it shall be lawful for my said trustees, or the trustees, or trustee, for the time being, to place out my residuary personal estate, in the mean time, and from time to time until a convenient purchase, or purchases of lands, or hereditaments can be found, in the public funds, or upon government or real securities at interest, in their, his, or her names or name, and when and as often as it may be thought prudent or proper to call in the principal money so placed out,

The same to be placed out in the funds until convenient purchases can be made, with power to vary and transpose the securities.

No. 13.



or to sell and transfer such funds or securities, and to reinvest the principal money so called in, or arising by such sale or transfer, in or upon any new, or other funds or securities of the like kind, and so from time to time to vary, alter, or transpose all such funds or securities for others of the same nature, so often as it may be thought meet. And my will is, that the dividends and interest arising from all such principal money, funds, and securities, shall, from time to time, go and be paid to such person or persons, and be applied for such intents and purposes, as the rents and profits of the lands, or hereditaments, to be purchased therewith, and settled as aforesaid, would go or be payable, or applicable unto, in case such purchase and settlement were actually made. Provided, and my will further is, that when, and so often as any of them, the said, &c. my said trustees hereby appointed, or any succeeding trustee or trustees, (whether introduced into the trusts of this my will, or any of them, by nomination or appointment under this present power, or by representation of any deceased trustee, or trustees,) shall die, or refuse, or neglect to act, or be desirous to be discharged from, or become incapable of acting in the execution of the said trusts, or any of them, it shall and may be lawful for the surviving, or other trustees, or trustee, for the time being, whether introduced into such trusts by nomination or appointment, or by representation as aforesaid, by any deed or writing, deeds or writings, under his, her, or their hand and seal, or hands and seals, attested by two or more credible witnesses, to nominate and appoint any other person or persons to be a trustee or trustees for the purposes herein mentioned, or any of them, in the stead of such trustee or trustees, so dying, or refusing, or neglecting to act, or being desirous to be discharged as aforesaid. And the said trust estates, whether real or personal, shall upon, or so soon as conveniently may be after every such nomination or appointment, be conveyed, assigned, and transferred, so as that the same may be vested in such new trustee, or trustees, (if any) their heirs, executors, administrators, and assigns, according to the nature and quality thereof respectively. And if there shall be no continuing trustee, then wholly in

The interest and dividends to go as the rents of the purchased estates would go, if purchased.

Power for change, and substitution of the trustees under the will.

No. 13. such new trustee, or trustees, as the case may happen, and his or their heirs, executors, administrators, and assigns, according to the nature and quality thereof respectively, upon the trusts, and for the intents and purposes, and with, under, and subject to the powers, provisos, and declarations expressed or declared concerning the same respectively by this my will, or such and so many of them as shall be then subsisting, or capable of taking effect; and every such new trustee, his heirs, executors, administrators, and assigns, shall have, and be invested with every power and authority hereby delegated to the trustees herein named, either alone, or in conjunction with such former trustees, or trustee, as the case shall be. Provided also, that my said trustees respectively, for the time being, shall be charged, and chargeable only with such monies as they respectively shall have actually received, and that one of them shall not be answerable or accountable for the other, or for the acts, receipts, neglects or defaults of the other of them, but each only for his, her, or their own acts, receipts, neglects, or defaults; neither shall they, my said trustees, for the time being, be answerable or accountable for any misfortune, loss, or damage, that may happen, of or to the said trust estates, monies, and premises, or any part thereof, except the same shall happen by or through his, her, or their wilful default respectively. And also, that my said trustees for the time being, and each of them, their, and each of their heirs, executors, administrators, and assigns, shall and may, by and out of the monies that shall come to their respective hands by virtue of the trusts aforesaid, retain to, and reimburse herself, himself, and themselves respectively, and allow to his, her, or their co-trustee or co-trustees, all such costs, charges and expences, as they, either, or any of them shall or may respectively sustain, expend, disburse, or be put unto, in or about the execution of the trusts hereby in them reposed, or in any wise relating thereto. And I appoint ———, ——— and ———, executrix and executors of this my will. And I also appoint them, and the survivor and survivors of them, guardian and guardians of such child or children as I may have, whether born in my life, or after my decease, during

their respective minorities. And I revoke all former and other wills by me at any time heretofore made, and declare this only to be my last will and testament. In witness, &c. No. 13.



No. 14.

A Merchant's Will, providing for the continuance of his trade, under the management of his executors, for the benefit of his family, and for the future introduction of his sons into the business.

THIS is the last will and testament of me, ——— of ———. I direct that my executors, hereinafter named, do and shall, within one month after my interment, cause a full, true, and accurate inventory schedule and account to be made and taken of all and singular my estate and effects of every nature or kind whatsoever, whether real or personal, and that five fair copies thereof shall be transcribed and signed by all my said executors, and that one of the said copies so signed as aforesaid, shall be delivered to each of my said executors, for his own use. And I will and direct that all such debts and sums of money as I shall justly owe at the time of my decease, together with the expences of my funeral, and the probate of this my will, and the execution thereof, be fully paid and satisfied by my said executors, out of my personal estate. I give and bequeath to my dear wife, S. T., the sum of 100*l.* to be paid to her immediately after my decease; and to each of my children, who shall be then living, the sum of 20*l.*, to be applied by their mother, for their use in mourning and necessaries, immediately after my decease. I give and bequeath unto my said wife, S. T.,

Executors within a month after testator's interment to make an inventory of all his estate and effects.

Debts and funeral and testamentary charges to be paid out of the personal estate.

No. 14. over and above the estates which are already settled upon her, (situate, &c.) one annuity, or yearly sum of 400*l.* for and during the term of her natural life, in case she shall so long continue my widow; and I do hereby direct that the same shall be charged upon the interest to arise, accrue, or be paid, as hereinafter is mentioned, from or by the capital to be employed in my trade or business of ———, which is to be carried on by my said executors, according to the directions hereinafter for that purpose given and contained: and that the said annuity, or yearly sum of 400*l.* shall be paid to her, my said wife, by four equal quarterly payments, on Lady-day, Midsummer-day, Michaelmas-day, and Christmas-day, in every year, the first payment thereof to begin and be made on such of the said days as shall next happen after my decease.

Annuity to the wife, durante viduitate, over and above the settled provision.

But in case my said wife shall marry again, at any time after my decease, then, and in such case, I revoke the said bequest of the said annuity of 400*l.* hereinbefore given to her, and direct that the same shall, from thenceforth, cease and determine; and instead thereof, I give and bequeath unto ——— and ———, one annuity or yearly sum of 300*l.*, for and during the remainder of the natural life of my said wife, subject nevertheless to the proviso hereinafter contained, for determining the same, to be charged upon the interest to arise, accrue, or be paid, as hereinafter is mentioned, from the capital employed in my said trade or business, and to be payable at or upon the like four equal quarterly days of payment as aforesaid, that is to say, Lady-day, Midsummer-day, Michaelmas-day, and Christmas-day, in every year: and the first payment of the said annuity of 300*l.* to begin and be made on such of the said days as shall first and next happen after such second marriage of my said wife, upon trust, nevertheless, that they, the said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall pay the said last mentioned annuity of 300*l.* from time to time, as and when the same shall become due and payable, and be received by them as aforesaid, unto my said wife, S. T., in the manner hereinafter expressed. And I hereby expressly will, direct and declare, that the said annuity, or yearly sum of 300*l.* or any part thereof, shall not be subject,

In case of her second marriage, the annuity to be reduced and paid to her separate use.

or in any manner liable to the debts, control, engagements, or intermeddling of any husband, with whom my said wife shall hereafter happen to intermarry, but that the same shall, from time to time, be paid into her hands, to and for her own sole separate and peculiar use and benefit, and not into the hands of any other person or persons whomsoever. And that the receipt and receipts of my said wife, under her hand alone, notwithstanding her coverture, shall, from time to time, be a good and sufficient discharge, and good and sufficient discharges, to my said trustees, for so much of the said last mentioned annuity, as in such receipt or receipts shall be acknowledged or expressed to have been received. (Proviso for restraining her from assigning the annuity, see page 371). And my will is, that it shall and may be lawful to and for my said wife, in case she shall continue my widow until the time of her decease, (but not otherwise) in and by her last will and testament in writing, to be by her signed and published in the presence of, and attested by two or more credible witnesses, to give, bequeath and dispose of the sum of 5000*l.* to be charged and chargeable upon, and raised and paid out of the residue of my personal estate, unto such person or persons, in such parts, shares, and proportions, and in such manner and form as she shall think fit. But in case my said wife shall marry again at any time after my decease, and she shall not, at any time during her life, have forfeited the said annuity of 300*l.* under the proviso hereinbefore for that purpose contained, then, and in such case, but not otherwise, it shall and may be lawful to and for my said wife, by her last will and testament, to be executed and attested in such manner as aforesaid, to give, bequeath, and dispose of the sum of 2000*l.* only, to be in like manner charged, and chargeable upon, and raised and paid out of the residue of my said personal estate, unto such person or persons, in such parts, shares, and proportions, and in such manner and form as she shall think fit; and I do hereby charge, and make chargeable the residue of my personal estate and effects, with the payment of the said sum of 5000*l.* to the legatee or legatees thereof, to be named in the last will and testament of my said wife, in case she shall continue my widow until the time of her decease; or in case

No. 14.

Power to the wife to dispose by will of 5000*l.* to be paid out of the residue of the personal estate; to be reduced to 2000*l.* upon her marrying again.

No. 14. of her marrying again, then with the payment of the said sum of 2000*l.* to the legatee, or legatees thereof accordingly. And my will is, that my said wife shall and may reside in the house wherein I now dwell, situate at ——— aforesaid, in case she shall think proper so to do, and shall and may have and enjoy the use of all my furniture, plate, linen, china, and glass, which shall be therein at the time of my decease, for and during her life, if she shall so long continue my widow, and unmarried, but not otherwise. And in case she shall think proper to quit the said house, at any time after my decease, then I give and bequeath unto her, my said wife, the sum of 500*l.*, in order to settle her in, and furnish for her any other habitation she may choose to reside in. And it is my will and mind, and I do hereby direct that the sum of ——*l.* per annum, shall be allowed and paid out of the interest to arise, and accrue, as hereinafter is mentioned, from or by the capital to be employed in my said trade or business of ———, to be carried on by my said executors, as hereinafter mentioned, for the maintenance and education of each of my daughters, E., S., and M.; and also the like sum of ——*l.* per annum, for the maintenance and education of each and every other daughter I may hereafter have, until my said daughters, E., S., and M., and my said other daughters shall respectively attain the said age of 12 years. And that from and after their respectively attaining the age of 12 years, the sum of 100*l.* per annum, shall be allowed and paid out of the said interest to arise or accrue as aforesaid, for the maintenance and education of each and every of my said daughters, until they respectively shall attain the age of 21 years, in case they shall so long continue sole and unmarried, but not otherwise. And my will is, and I do hereby direct that the said (trustees) or the survivors and survivor of them, or the executors or administrators of such survivor, do and shall as and when each of them my said daughters E., S., and M., and as and when each and every such other daughter as I may hereafter have, shall respectively attain the age of 21 years, or marry with the consent of my trustees or trustee for the time being, or the major part or equal number of them, by and out of my personal estate, lay out and invest the sum of

Power to the wife to reside in the dwelling house.

Annual sums to be applied out of the interest of the capital of the business, for the maintenance of testator's daughters, varying with their ages.

To invest 5000*l.* as each daughter comes of age, and to pay the interest to her for life, to her separate use.

5000*l.* in the purchase of an equivalent share or shares of the parliamentary stocks or funds of Great Britain, in their, his or her own names or name, and that they the said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor do and shall stand and be possessed of and interested in the stocks, funds, or securities, so to be purchased as aforesaid, upon the trusts, and to and for the intents and purposes hereinafter expressed and declared of and concerning the same, (that is to say) upon trust to pay to, or otherwise sufficiently authorize and empower every such daughter so attaining the said age of 21 years, to have, receive, and take the interest, dividends, and annual produce of the stocks, funds, or securities so to be purchased with one of the said sums of 5000*l.* during her life, for her own sole, separate and peculiar use and benefit, and so as the same or any part thereof shall not be subject or in any manner liable to the debts, control, engagements, or intermeddling of any husband whom such daughter may happen to marry. And my will is, and I do hereby expressly direct and declare that the receipt and receipts of every such daughter under her hand shall, notwithstanding her coverture, be a good and sufficient discharge to my said trustees or trustee for the time being, for so much of the said dividends, interest, or annual produce, as in such receipt or receipts shall be acknowledged or expressed to have been received. Provided always, and I do hereby declare my will and mind to be, that it shall not be lawful for my said daughters respectively to charge, sell, assign, or otherwise dispose, by way of anticipation, of the interest, dividends, and annual produce so to them respectively payable as aforesaid, and that notwithstanding such charge, sale, assignment, or other disposition, it may and shall be lawful to and for my said trustees, or the trustees or trustee for the time being, and they, he and she is and are hereby required, to pay the said interest, dividends, and annual produce, into the proper hands of my said daughters respectively, for their respective, separate, and peculiar use and benefit upon their own respective receipts. And my will is, and I do hereby direct, that from and after the decease of every such daughter of my body, they my said trustees, or the survivors or survivor of them,

No. 14.

Proviso against assigning or anticipating.

To and among the children of daughters, and

No. 14.

the issue of such children born in the life-time of the daughter, as the daughter shall appoint.

or the executors or administrators of such survivor, do and shall stand and be possessed of, and interested in the said stocks, funds, or securities so to be purchased with the said sum of 5000*l.* the interest, dividends, and annual produce whereof are hereinbefore directed to be paid for life to such daughter so dying as aforesaid, upon the trusts, and to and for the intents and purposes hereinafter mentioned, expressed, and declared of and concerning the same, that is to say, in trust for all and every or such one or more exclusively of the children of such my daughter, or in trust for all and every or such one or more exclusively of the issue, born in the life-time of such my daughter, of any such child or children, or both, in such manner, with such provisions for their respective maintenance or education, and if more than one such child or issue, in such shares and proportions as such my daughter respectively by any deed or deeds, or instrument or instruments, in writing, to be by her sealed and delivered, or by her last will and testament to be by her signed and published as aforesaid, shall from time to time direct or appoint. And in default of appointment of the same, under the power hereinbefore contained, or so far as such appointment shall not extend, and subject to the trusts hereinbefore declared of the same, upon trust for all and every the child and children of such my daughter, who being a son or sons shall attain the age of 21 years, or being a daughter or daughters shall attain that age, or marry with such consent as aforesaid, equally to be divided between or amongst them, if more than one, share and share alike, and if but one such child then for such one child. And my further will is, and I do hereby direct, that in default of appointment respectively as aforesaid, after every such my respective daughter's decease, the dividends and interest, and annual produce of the stocks, funds, or securities on which the said 5000*l.* shall have been invested, to the dividends, interest, and annual produce of which such daughter shall have been entitled, or so much as shall be thought necessary by my said trustees or the trustees or trustee for the time being, of the said dividends, interest, and annual produce, shall be applied in, for, and towards the maintenance and education of such her child or children during his, her, or their respective mino-

Education and maintenance out of the interest of the respective portions. The residue to accumulate.

No. 14.

rities: and the residue thereof shall be invested in or upon such securities as aforesaid, and accumulated in the way of compound interest; and that such accumulations shall be in trust for the persons who, under the trusts hereinbefore or hereinafter declared, shall become absolutely entitled to the funds whence such accumulations shall have proceeded. And in case any such my daughter shall have no child, who being a son shall attain the age of 21 years, or daughter who shall attain that age, or marry with such consent as aforesaid, then and in such case, and in default of appointment respectively as aforesaid, in trust, that my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall stand and be possessed of and interested in the said stocks, funds, and securities, the interest, dividends, and annual produce whereof is hereinbefore directed to be paid to such my daughter for her life as aforesaid, in trust, for such person or persons, in such shares and proportions, and in such manner and form, as such daughter shall by any deed or deeds, or instrument or instruments, in writing, to be by her sealed and delivered, or in and by her last will and testament in writing to be by her executed and attested in such manner as aforesaid, direct, limit, or appoint; and for want of such direction, limitation, or appointment, and as to so much or such part thereof whereof no such direction, limitation, or appointment shall be made, upon trust, for my said wife, if she shall be then living and shall have continued my widow, and all and every my children now born or hereafter to be born, who being a son or sons shall attain the age of 21 years, or being a daughter or daughters shall attain that age, or marry with the consent of my trustees or trustee for the time being, or the major part or equal number of them, to be divided between or amongst my said widow and children, share and share alike; but in case my said wife shall be then dead, or shall not till then have continued my widow, upon trust, for all and every my children now born or hereafter to be born, who being a son or sons shall attain the age of 21 years, or being a daughter or daughters, shall attain that age, or marry with such consent as aforesaid, to be divided between or among them, if more than one, share and share

And if no child of any of his daughters shall live to attain 21, then to such persons as the daughter shall appoint.

And in default of appointment to go to and among his widow and children, in case his widow shall not have married again, and if she shall have married again, then among the children only.

No. 14. alike, and if but one such child, then the whole to be in trust for that one child, and if I shall have no child, then the whole to be in trust for my wife, if she shall be then living and shall have continued my widow as aforesaid. And my will is, and I do hereby direct, that the sum of 70*l.* per annum shall be allowed and paid out of the interest to arise or accrue as hereinafter is mentioned, from or by the capital employed in my said trade or business to be carried on by my said executors as hereinafter is mentioned, for the maintenance and education of each of my sons now born, or hereafter to be born, until they shall respectively attain the age of 12 years, and from and after their respectively attaining that age, that the sum of 100*l.* per annum shall be allowed and paid, out of the interest to arise or accrue as aforesaid, for the maintenance and education of each of my said sons now born or hereafter to be born, until they shall respectively attain the age of 21 years. And whereas I think it will be advantageous to my sons that the trade or business, which I now carry on at —— aforesaid, shall be continued after my decease, and preserved for them or such of them as may choose to carry on the same, when they shall attain a proper age; and I am therefore desirous of giving my said wife and my said trustees hereinafter named, full power to continue and carry on the same in such manner as is hereinafter-mentioned: now I do for that purpose give and bequeath all my capital and stock in trade, and all my cash, debts, and effects which shall be employed in or belonging to the said trade or business at the time of my decease, unto my said wife and the said trustees, their executors, administrators, and assigns, upon the trusts, and to and for the intents and purposes hereinafter mentioned, expressed and declared concerning the same, (that is to say) upon trust, that they my said wife, and the said (trustees), and the survivors and survivor of them, and the executors or administrators of such survivor, may and shall carry on the said trade or business of a ——, for the term or time, and in manner hereinafter-mentioned, (that is to say) if all my sons, W., F., T., and G., shall attain the age of 21 years, then until the youngest of my said sons shall attain the age of 21 years; but if all of them shall not live to attain the age of 21 years,

An annual sum to be applied out of the interest of the capital to be employed in the business, to and for the maintenance and education of testator's sons; to vary in amount with their ages.

Testator's trade to be carried on by his executors.

To be carried on by the executors till the youngest

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then until the last of them attaining the age of 21 years, shall actually attain that age, or for such further or longer period as may be necessary for the purpose of performing the trusts hereby in them reposed of or concerning the said trade or business. And I give and bequeath unto such of them the said (trustees) as shall prove this my will, and act in the execution of the trusts thereof, but not otherwise, for his trouble therein, the annual sum of ——*l.* to commence and be computed from the time of my decease, and continue until my second son for the time being, shall attain the age of 22 years, the same to be paid annually, and after the same rate for any less time than a year that shall happen of the period between the time of my decease, and such my second son's attaining the age of 22 years as aforesaid. And my will is, and I do hereby direct, that they the said (trustees,) and the survivors and survivor of them, and the executors or administrators of such survivor, do and shall, immediately after my decease, cause a full, true, and just account in writing, to be made and taken of all the capital, stock, and cash employed in the trade aforesaid, and all the debts and things which shall be then belonging, due, and owing to the said trade, and of all such debts as shall be due or owing from or by the said trade to any person or persons; and do and shall cause a just valuation and appraisement to be made of all the particulars in the said account, in order that the net amount of the capital then employed in the said trade may clearly appear; and that my said trustees, and the survivors and survivor of them, and the executors or administrators of such survivor, do and shall, on —— next after my decease, or within one calendar month then next following, and so yearly and every year whilst the said trade shall be carried on by them, in pursuance of the powers herein for that purpose contained, on the same day, or within one calendar month next afterwards, cause to be made up and stated a full and accurate account, statement, and adjustment of the accounts of the said trade, and shall and do cause to be made and taken, a like account, in writing, of all the stock, monies, debts, and other things which shall be then belonging, due, or owing to the said trade, and of all such debts, as shall be due or owing from or by

son shall have attained 21.

The executors to have an annual sum for their trouble.

Executors to make up a full account of all the stock and cash employed in the trade, and of the debts due to or from the same, and to have all the property in the trade valued, that the amount of the net capital may appear.

And to make out a yearly account.

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The profits of the trade in the first place to answer the interest of 5*l.* per cent. per ann. upon the net amount of the capital employed.

The annuity to the wife, and the several sums before directed to be allowed and paid, to come out of this interest.

And subject to such trusts, to invest the residue of such interest in the funds or government securities, to accumulate in the way of compound interest, until divided amongst the sons.

This division to be in equal shares, one moiety to be paid as they respectively arrive at the age of 21, and the other moiety, with the intermediate accumulations, as they arrive at the age of 25.

the said trade, to any person or persons whomsoever, and do and shall cause a just valuation and appraisement to be made of all the particulars included in such account; and that the profits and gains which shall arise, or be made from or by the said trade, shall in the first place be liable to answer interest after the rate of 5*l.* per cent. per annum, upon the net amount of the capital in cash and effects, which shall be from time to time employed in the said trade, including the debts owing to the trade, of which interest a distinct account shall be kept; and out of such interest my said wife shall have, receive, and be paid the annuity hereinbefore given to her, or in trust for her as aforesaid, and the said several sums hereinbefore directed to be allowed and paid, for the maintenance and education of my said sons and daughters respectively, shall be allowed, deducted, and paid; and subject thereto respectively, the said interest shall, from time to time, be laid out in, or invested upon, the parliamentary stocks or public funds of Great Britain, or at interest upon government securities in England, to be from time to time altered and varied at the discretion of my said trustees, or the trustees or trustee for the time being, so that the same and the resulting income and produce thereof may be accumulated in the way of compound interest, until the same shall be divided amongst my sons, as well those already born as those hereafter to be born, in the manner next hereinafter mentioned, (that is to say) the same shall be divided into as many shares as I shall have sons already born or hereafter to be born, and when each of my said sons shall attain the age of 21 years, he shall have and be entitled to one of such shares, and the same shall be paid to him as follows, (that is to say) one moiety or half part of such share immediately on his attaining the age of 21 years, and the other moiety or half part of such share, together with the intermediate accumulations of such moiety, on his attaining the age of 25 years; and each of such my said sons shall, from and after his attaining his age of 21 years, also have and receive a proportionable part or share of the gains to arise or accrue on the said capital, after payment of the said annuity to his mother, and the several sums hereinbefore directed to be allowed and paid thereout as aforesaid. And

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I do hereby declare my will and mind to be, that the overplus of the said profits and gains, after answering interest upon the said capital as aforesaid, shall from time to time be added to the said capital, and shall be therewith employed in carrying on the said trade or business as hereinbefore directed. Provided always, that in case any of my said sons shall depart this life under the age of 21 years, then and in such case, and so often as the same shall happen, the part or share of such son so dying, of and in the money so directed to be raised for interest, and so to be invested and accumulated as aforesaid, and also the future interest to accrue for the same, shall be paid to and amongst the survivors or others of them, if more than one, share and share alike, and if more than one of my said sons shall depart this life under the age of 21 years, then and in such case, and so often as the same shall happen, the surviving or accruing share or shares to which such son or sons would, on attaining the age of 21 years, have become entitled under the clause last hereinbefore mentioned, shall again survive and accrue to the survivors or survivor, or others or other of them my said sons, in equal shares and proportions if more than one, and in case all of them save one shall happen to die under the age of 21 years, then as well the whole of the interest so to be invested and accumulated as the whole of such profits and gains to belong to such one or only son, and to be an interest vested in him on his attaining the age of 21 years, and to be paid to him at the respective times and in manner aforesaid. And my will is, that when my said son W. shall attain the age of 21 years he shall become and be admitted a partner in the said trade, if he shall think proper, and shall in such case have and be entitled, during the partnership, to one-fourth of the profits and gains which, after answering such interest as aforesaid while the same shall continue payable, may or shall arise or be made in the said trade after his admission as such partner therein; and my will also is, that when my son F. shall attain the age of 21 years he shall become and be admitted a partner in the said trade, if he shall think proper, and shall in such case have and be entitled, during the partnership, to one-fourth part of the profits and gain which, after answering the said interest,

The overplus of the profits, after answering such interest upon the capital, to be added to the capital employed in the business.

Shares of the sons to survive.

Each son attaining 21 to be admitted a partner, and to be intitled to a fourth.

No. 14. shall arise or be made in the said trade after his admission as a partner therein; and my further will is, and I do hereby declare, that when my son T. shall attain the age of 21 years he shall become and be admitted a partner in the said trade, if he shall think proper, and shall in such case have and be entitled, during the partnership, to one-fourth part or share of the profits and gains, which, after answering the said interest, shall arise or be made in the said trade after his admission as a partner therein; and further my will is, that when my son G. shall attain the age of 21 years he shall become and be admitted a partner in the said trade, if he shall think proper, and shall in such case be entitled, during the partnership, to one-fourth part of the profits and gains which shall, after answering the said interest, arise after his admission as a partner therein.

The sons to make their election as they come of age, to enter into the business or not.

And my will is, and I do hereby direct, that all my said sons shall, within the space of one year next after they shall respectively attain the age of 21 years, determine and elect whether they will become partners in the said trade or not, and in case they determine and elect to become partners therein, they shall within that time respectively notify such their election and determination, by writing, under their respective hands, to my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, or otherwise they shall be considered as having refused to become partners therein.

Proviso empowering the trustees to remove from the business any son, whose conduct proves him to be unqualified.

Provided always, and my will is, that in case my trustees, or trustee for the time being, or the major part of them, shall, from the conduct of any or either of my sons who shall become and be a partner or partners as aforesaid, while any of the trusts of this my will, respecting the said trade, shall remain unperformed, be of opinion that it will be injurious to the trade then carried on, and to the rest of the partners therein, that such son or sons should any longer continue a partner or partners in the said trade, that then and in such case it shall be lawful to and for my said trustees, or the trustees or trustee for the time being, or the major part of them, and he and they shall have full power and authority immediately to dissolve the partnership, so far as respects such son or sons, and such son or sons shall thenceforth be no longer a partner or partners in the said

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And such son so excluded or refusing, shall have the legacy and provision aftermentioned.

trade, but from and after such dissolution of the said partnership, or dismission therefrom, shall have, and be entitled to such legacy and legacies, and provision, as is hereinafter made for such of my said sons as shall neglect or refuse to become a partner or partners in the said trade or business, any thing hereinbefore contained to the contrary thereof in anywise notwithstanding. And my further will is, and I do hereby direct, that in case any of my said sons W., F., T., and G. shall refuse to become partners or a partner in the said trade, within the time aforesaid, then every of such sons so refusing to become a partner in the said trade shall, upon his attaining the age of 22 years, (but not unless he attains that age) have and receive, from and out of the capital then employed therein, the sum of 4000*l.* to and for his and their own use and benefit; and every of such sons shall, nevertheless, be entitled to, and shall have and receive, his original share of the interest which shall have arisen or accrued from or by the said capital employed in the said trade, up to the time of his attaining the age of 21 years, the same to be paid and payable at the time and in the manner hereinbefore mentioned, but shall not be entitled to any further part or share thereof, by way of survivorship or accruer, on the death of any other or others of my said sons.

Such son to have a legacy of 4000*l.* and his original but not accruing share in the interest of 5 per cent. upon the capital aforesaid.

All the profits and gains of the business, after answering the objects aforesaid, to belong to the survivors of those dying under 21 continuing in the business, and to such as elect to be in and continue in the business, exclusively of those who refuse or withdraw.

And I also declare my will and mind to be, that in case any of my said sons W., F., T., and G. shall depart this life under the age of 21 years, or shall refuse to become a partner in the said trade within the time aforesaid, or withdraw himself therefrom after his admission as a partner therein, then and in such case the survivors and survivor of them my said sons W., F., T., and G., who shall elect to become such partner or partners in the said trade, in the manner and upon the terms aforesaid, shall have and be entitled in equal shares and proportions, to the whole of the share or shares to which such son or sons, so dying under the age of 21 years, or declining to become a partner or partners in the said trade, or withdrawing himself therefrom, would either originally or by survivorship or accruer have been entitled, of the profits and gains which, after deducting such interests as aforesaid, shall arise or be made in the said trade or business, after their respective admission as partners therein. And in case

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If only one son shall elect to be in the business, he is to pay one sixteenth of the profits to the others refusing until their attaining — years, or dying, provided they do not carry on the same trade within the weekly bills of mortality.

all my said sons but one shall happen to depart this life under the age of 21 years, or shall refuse to become partners in the said trade, then and in such case, such one son who shall elect to come into the said trade in order to carry on the same in partnership as aforesaid, shall have and be entitled to the whole of the profits and gains which shall arise or be made in the said trade, after his admission to the same, (after answering and paying thereout interest upon the net amount of the capital employed in the said trade, and also paying unto such of his brothers as shall refuse or decline to carry on the said trade in partnership, or shall withdraw himself from the said trade after his admission as a partner therein, one-sixteenth part of such profits and gains, until such brother shall attain the age of —— years, or depart this life, provided such brother shall not carry on the same trade within the weekly bills of mortality as hereinafter is mentioned;) and such one son who shall elect to come into the said trade in order to carry on the same in partnership, and shall continue therein, shall and may thenceforth, and subject as aforesaid, carry on the said trade to and for his own use and benefit.

Future stile or firm of the partnership.

And my will is, and I do hereby direct, that the firm or stile by which the said trade shall be carried on, until one or more of my said sons shall be admitted therein, shall be "——," and after the admission of one or more of my said sons therein the same shall be "—— and Son," or "—— and Sons," as the case may be.

If all refuse or withdraw, they are to have each one sixteenth till of the age aforesaid, or death.

And my will is, and I do hereby direct, that in case all or any of my said sons shall refuse or decline (within the respective times before limited) to carry on the said trade or business in partnership, upon the terms and in the manner hereinbefore mentioned, then I do hereby direct, that every such son, so refusing or declining to carry on the said trade or business, shall have and be entitled to one-sixteenth part or share of the clear profits or gains thereof, until they shall respectively attain the age of —— years, or depart this life, which shall first happen; and in case any of my said sons, who shall become a partner or partners in the said trade or business, shall at any time after his or their admission into the same, and before his or their attaining the age of —— years, be desirous of withdrawing himself or themselves

therefrom, then and in such case such son or sons, so withdrawing himself or themselves from the said trade or business, shall have and be entitled to one-sixteenth part or share of the clear profits and gains thereof, until he or they shall attain the age of —— years, or depart this life, which shall first happen. Provided always, that no such son or sons, so refusing, declining, or withdrawing himself or themselves, shall afterwards carry on the same trade within the weekly bills of mortality. But in case such son or sons, so refusing, declining, or withdrawing as aforesaid, shall carry on or be concerned in the same trade within the bills of mortality, then and from thenceforth the said one-sixteenth part or share, so directed to be paid to him, shall cease and determine, and he or they shall not, at any time thereafter, have or be entitled to any share of the profits and gains of the said trade or business to be carried on by the other son or sons, in pursuance of this my will. And my will is, and I do hereby direct, that when all my said sons, W., F., T., and G., shall have attained the age of 28 years, in case they shall all of them have elected to become partners in the said trade, and none of them shall have withdrawn himself from the same, or in case any of my said sons shall have declined or refused to become partners or a partner in the said trade, or withdrawn themselves or himself therefrom, and have departed this life under the age of 28 years, and I shall have any other son or sons hereafter born who shall live to attain the age of 21 years, (in which case such after-born son or sons shall have the election of coming into the said trade, and being admitted a partner or partners therein, if he or they shall think proper, in the place of his brother or brothers who shall so decline or refuse to become a partner or partners therein, or withdraw himself therefrom, or die under the age of 28 years,) then when such after-born son or sons, as shall so elect to come into and be a partner or partners in the said trade, shall have attained the age of 28 years, or have departed this life under that age, and being in partnership as aforesaid at the time of such death, my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall make up, state, and settle a full and

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The sixteenth share to cease, upon any of them carrying on the same trade within the bills of mortality.

When all the children, being in the partnership, shall have reached 28, or be dead under that age, whilst in partnership, the trustees are to make up a general account of all the effects, and invest 20,000*l.* in the funds, and then distribute the residue into double the number of shares that there are children living to 28 years in the partnership, or dying in the partnership and leaving widows and children,

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and to give one share to the family of each son so dying under 28, in the business, and the remaining shares equally among those who have lived to attain 28, in the partnership business.

general account, in writing, of all the stock, monies, debts, and effects, which shall be in or belonging, or due or owing to the said trade or business, and shall and do cause a just valuation and appraisement to be made of all the particulars thereof, and do and shall in the first place (after raising and paying thereout the sum or sums of money hereinbefore mentioned, to each of my said sons and daughters, or such of them as shall have lived to become entitled thereto) raise thereout the sum of 20,000*l.*, and lay out and invest the same in the purchase of a competent share or competent shares of the parliamentary stocks or funds of Great Britain, in their, or his, or her own names or name, and do and shall stand and be possessed of, and interested in, the said stocks, funds, and securities to be purchased with the said sum of 20,000*l.*, upon the trusts, and to and for the intents and purposes hereinafter mentioned, expressed, and declared of and concerning the same; and after the said several sums so to be raised shall have been raised as aforesaid, and all the legacies hereby given and bequeathed shall be answered and paid, and subject thereto, then upon trust, that they my said trustees, or the survivors or survivor of them, and the executors or administrators of such survivor, do and shall part and divide all the residue and remainder of the said capital, stock, debts, and effects which shall be in or belonging, or due or owing, to the said trade or business, into double the number of shares, as there shall be sons of my body now born, or hereafter to be born, who shall attain the age of 28 years and be then living, or who, while in partnership as aforesaid, shall have attained the age of 28 years, or die under that age, leaving a widow and a child, or children living at his decease, or born in due time after, or a widow only, living at his decease, or a child or children living at his decease, and no widow; and if all my said sons, so electing to be and remaining partners, shall attain the age of 28 years, the whole of the said capital, stocks, debts and effects shall be, in trust, for such my said sons, in equal shares and proportions; and if I shall have but one son electing to be and continuing a partner, who shall attain the age of 28 years, and no son who, being and continuing a partner as aforesaid, shall depart this life under that

age, leaving a widow and a child or children living at his No. 14.
decease, or born in due time after, or leaving a widow only, or a child or children then living, but no widow, then the whole of the said capital, stock, debts, and effects, to be in trust for that one son; and if I shall have one or more son or sons, who, being a partner or partners, shall attain the age of 28 years, and one or more son or sons, who, being and continuing a partner as aforesaid, shall die, leaving a widow and a child or children living at his or their decease, or respective deceases, or born in due time after, or leaving a widow only, or a child or children living at his or their decease, or respective deceases, but no widow, then if only one of my sons, being and continuing a partner as aforesaid, shall have left a widow and children, or a child living at his decease, or born in due time after, or have left a widow only, or a child or children only living at his decease, and no widow, one of the said shares shall be laid out and invested in the public funds, upon the trusts hereinafter expressed and declared, for the use and benefit of the widow, and child or children of such one son, dying while such partner as aforesaid, and leaving such widow, child, or children as aforesaid: and if more than one of my said sons, being and continuing a partner as aforesaid, at the time of his death, shall have left a widow and a child or children living at their respective deceases, or born in due time after, or a widow only, or a child or children living at his or their respective deceases and no widow, then as many of the said shares shall be so laid out and invested, upon the trusts hereinafter expressed, as I shall have sons, being or continuing a partner as aforesaid, at the time of their deaths, who shall have respectively left a widow, and a child or children living at their respective deceases, or born in due time after, or have left a widow only, or a child or children living at their respective deceases and no widow, and the remainder of the said shares shall be divided between or amongst such of my said sons then living as shall have elected to become partners, and shall have continued partners in the said trade to their respective age of 28 years, share and share alike; and if but one shall be then living, who shall have elected to enter into and carry on, and shall

No. 14. have continued in the said trade, and shall have attained the age of 28 years, then such one son shall have and be entitled to the remaining shares thereof, the part or share, or parts or shares of such widow and child or children, respectively to be ascertained, according to the then last preceding annual settlement, and to be paid to my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, upon trust, that they the said trustees, or the trustees or trustee for the time being, do and shall place out, and invest the same in the purchase of a competent share or competent shares of the parliamentary stocks or public funds of Great Britain, in their, or his, or her own names or name, and do and shall stand and be possessed of the said stocks, funds, and securities so to be purchased as aforesaid, upon such and the same trusts, for the benefit of such widow and children, and with such limitations over, for the benefit of my other sons and their widows and children, and subject to such powers and provisos as are hereinafter mentioned, expressed, and declared of and concerning the stocks or funds to be purchased with the said sum of 20,000*l.* hereinbefore directed to be invested as aforesaid, so far as such trusts relate to the widows and children of the sons, for whom or for whose widow and children the said sum of 20,000*l.* is intended to be invested, or as near thereto as circumstances will permit. Provided always, and in case I shall have no son, who, being a partner, shall attain the age of 28 years, and be living at the time hereinbefore expressed to entitle him to such surplus or remaining shares, and I shall have two or more sons who shall become partners as aforesaid, and while in partnership shall die and leave a widow and a child or children living at his or their decease or respective deceases, or born in due time after, or leave a widow only, or a child or children living at his or their decease or respective deceases, and no widow, then it is my will that the widow and child or children, or widow only, or child or children of such deceased sons, shall, per stirpes, and not per capita, be entitled to have, take, and divide among them such surplus shares, in such proportions as shall be equal to the number of my sons who shall become partners as aforesaid, and

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and while in partnership die, and leave such widow and child, or children, or such widow only, or such child or children, and no widow as aforesaid, and so that such widow or widows, and child or children, may, in the proportions aforesaid, according to their stocks, husbands and parents, respectively, be entitled to the whole of the surplus shares between or among them, according to the trusts hereinafter declared, of their said several and respective proportions; and in case I shall have only one such son as last hereinbefore mentioned, then it is my will that such widow and child, or children, or such widow only, or child or children of such only son, shall be entitled to have and take such surplus shares, and the full and whole benefit of the same, as well as the other provisions hereby made for him, her, or them, according to the trusts hereinafter declared. And in case I shall have no son, who, being a partner as aforesaid, shall attain the age of twenty-eight years, and be living at the time hereinbefore expressed to entitle him to such surplus shares, nor any son who shall become a partner as aforesaid, and while in partnership as aforesaid, shall die, leaving such widow and child, or children only as aforesaid, then, and in that case, all the residue and remainder of the said capital, stock, debts, and effects shall be in trust for all and every the children of my said daughters, who shall attain the age of 21 years, such children of my said daughters to take per capita, and not per stirpes, in equal shares and proportions, if more than one; and if there shall be but one such child, the whole to be in trust for that one child, and if none of my daughters shall have a child that shall attain the age of 21 years, then in trust for all my nephews and nieces who shall be then living, and the survivor of them, his, or her executors, administrators, or assigns.

And if no sons, or their families shall become entitled to these shares, then the whole remainder of the capital stock and effects of the business to go to the children of testator's daughters, per capita, and not per stirpes.

And I do hereby direct, that my said trustees, and the survivors and survivor of them, and the executors or administrators of such survivor, do and shall stand, and be possessed of, and interested in, the said stocks, funds, and securities so to be purchased with the said sum of 20,000*l*., hereinbefore directed to be raised upon the trusts, and to and for the intents and purposes hereinafter mentioned, expressed, and declared, of and concerning the same, that is to say, upon

Trustees to stand possessed of the said sum of 20,000*l*.

No. 14. trust for all my sons, as well those already born, as those hereafter to be born, in equal shares and proportions, during their respective natural lives, as tenants in common, and not as joint tenants; and after the decease of each such son, upon trust to pay to the widow of such deceased son out of the interests and dividends of such his share of the said last-mentioned stocks, funds, and securities, such annual sum not exceeding ——*l.* per annum, as the said son shall, by writing under his hand and seal, and to be attested by two or more credible witnesses, or by his last will and testament, signed and published by him, in the presence of two or more such witnesses, have directed or appointed in that behalf; and subject to such annual payment as last aforesaid, upon trust for all and every the child and children of each such son, equally to be divided between or amongst the said children, share and share alike, and if but one, then in trust for such only child; the part or share, parts or shares of such children or child to be an interest vested, or interests vested in, and be paid to him, her, or them, at his, her, or their age, or respective ages of 21 years, and if any such children shall depart this life, under the age of 21 years, then as well the original part or share, parts or shares, of him, her, or them so dying, as the part or share, or parts or shares surviving or accruing, by virtue of this present clause, shall go and be paid to the survivors or survivor, or others or other of the said children, and their respective executors, administrators, or assigns, to be an interest vested, or interests vested in, and to be paid to the child or children respectively entitled thereto, at such time or times as is hereinbefore mentioned, with respect to his, her, or their original share or shares. And I do hereby will and direct, that after the decease of such son, the interest, dividends, and annual produce of the share, to which he shall be so entitled for his life, of the said sum of 20,000*l.*, and the stocks, funds, and securities in which the same shall be invested as aforesaid, or so much of the said interest, dividends, and annual produce as my said trustees, for the time being, shall think necessary, shall, after the decease of their respective fathers, and subject to any provisions made under the power for that purpose hereinbefore given by this my will, for the widows

In trust for the sons as tenants in common for their respective lives, and after their respective deceases in trust for their children respectively, in equal shares, per stirpes, with survivorship, respectively, subject to a provision for the widow of each such son.

Clause for maintenance and education.

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of their fathers respectively, be paid and applied for or towards the maintenance and education of such child or children, in the mean time, until he, she, or they shall respectively attain the age of 21 years, and the residue invested in such stocks, funds, and securities as aforesaid, so as to accumulate in the way of compound interest, and that such residue, and the accumulations thereof, shall be in trust for the persons, who, under this my will, shall become entitled to the fund whence such accumulation shall have proceeded. But in case any of my said sons shall, at the time of his, or their respective decease, leave a widow only, and no child or children, him or them surviving, or there being such child or children, in case all of them shall happen to die under the age of 21 years, then after the decease of such son or sons, as to the part or share, parts or shares, of such son or sons, as shall so die, leaving a widow, or widows, but no child or children, who shall live to attain the age of 21 years, upon trust for his or their widow, or respective widows, during their respective natural lives, (if she or they shall so long continue sole and unmarried,) and in case any one or more of my said sons shall have no child, who shall attain the age of 21 years, as aforesaid, then after his or their decease, or respective deceases, (subject to the provisions made, or to be made as aforesaid, for his, or their widow, or respective widows as aforesaid, in the share or shares to which such son or sons shall have been so originally entitled, for his or their life or lives respectively as aforesaid,) the same, immediately after the decease of such son or sons respectively, to be subdivided into as many shares as there shall be sons of my body then living, or then dead, having left a child or children, and the said shares shall be upon such trusts for my said surviving other sons, and their children respectively, as are hereinbefore declared, in respect to their said respective original shares, and so after the decease of any other son or sons, under 21 years of age, the share or shares to which such last-mentioned son or sons shall, or if living, would, by survivorship or accruer, be so entitled for life as aforesaid, shall also be upon such trusts for the then surviving, or the other sons, and their respective children, as are hereinbefore declared, as to their said respective ori-

In case of the death of a son, leaving no children, but a widow only, in trust for her during her life, and subject to the widow's interest or provision, to go among the surviving sons and their families, with survivorship as to the accruing shares.

No. 14. ginal shares, and if only one of my said sons shall have a child, who shall attain the age of 21 years, then after the decease of the other of my said sons, and such failure of issue of their bodies respectively as aforesaid, (and subject to the provisions hereinbefore and hereinafter contained for their widows respectively,) the whole of the said sum of 20,000*l.*, and the stocks, funds, and securities on which the same shall be invested, to be upon such trusts for such only son, and his child or children respectively, as hereinbefore is declared as to his original share of or in the same. And in case none of my said sons shall have a child, who shall attain the age of 21 years, then as to the whole of the said stocks, funds, or securities, hereinbefore directed to be purchased as aforesaid, (subject to the powers and provisions hereinbefore contained,) upon trust for all and every the children of my said daughters, who shall attain the age of 21 years, such children of my said daughters to take per capita, and not per stirpes, in equal shares and proportions, if more than one; and if there shall be but one such child, the whole to be in trust for that one child. And if none of my daughters shall have a child, who shall attain the age of 21 years, then upon trust to pay one moiety, or equal half part of the interest, dividends, and annual produce of the said sum of 20,000*l.*, and the stocks, funds, and securities on which the same shall be invested, unto my said dear wife, during the term of her natural life, in case she shall so long continue sole and unmarried, but without making any deduction out of her said annuity of ——*l.*, in respect thereof, and subject thereto, do and shall stand and be possessed of and interested in the said trust monies, stocks, funds, and securities, and the interest, dividends, and annual produce thereof, in trust for all my nephews and nieces, who shall be then living, or the survivor of them, and the executors, administrators and assigns of such survivor. Provided also, and my will is, that in case I shall have any other son or sons hereafter born, either in my life-time, or in due time after my decease, then I give and bequeath unto every such after-born son, 2000*l.*, to be an interest vested in and to be paid to him on his attaining the age of 21 years, and the sum of 4000*l.*, to be an interest in, and to be paid him upon his attaining the

And in case all the sons shall die without leaving any child, who shall acquire a vested interest, then subject to the widow's interest, to go to the children of the testator's daughters, and if none of the daughters shall leave a child, who shall acquire a vested interest, then the interest of the whole to be for the wife of testator, durante viduitate, and upon her decease, to testator's nephews and nieces, their executors, administrators and assigns.

Legacies to after-born sons, who are also to have equal shares in the 20,000*l.*

No. 14.

age of 24 years; and my will is, that every such after-born son, and his child and children (if any) shall have and be entitled to a share of the stocks, funds, and securities, to be purchased with the said sum of 20,000*l.*, hereinbefore directed to be invested as aforesaid, equally with my said sons, W., F., T., and G., and their children, the same to be payable, and paid at such time and times, and with, under, and subject to such and the same powers, provisos, and limitations, and to be attended with the same right of survivorship, and in such and the same manner in all respects as the shares to or in trust for my said sons, W., F., T., and G., and their widows and children, of and in the same stocks, funds, and securities, as are hereinbefore directed, limited, given, and bequeathed. Provided also, and my will is, and I do hereby direct, that in case any of my said sons shall depart this life whilst in the said business, before he shall attain the age of 28 years, leaving either a widow, and one or more child or children, him surviving, then, and in such case, as often as the same shall happen, I do hereby direct that such account and valuation as aforesaid, shall be made, taken, and settled, and that the part or share of such of my said sons so dying, of and in the said sum of 20.000*l.*, shall forthwith be raised, and laid out and invested in the purchase of a competent share, or competent shares of the parliamentary stocks, or public funds of Great Britain, in the names or name of my said trustees, or trustee, for the time being, upon such and the same trusts, for the benefit of his widow and child, and children, and subject to the same powers, provisos, and limitations over, as are hereinbefore directed, and shall not wait till all my sons shall attain the said age of 28 years, any thing hereinbefore contained to the contrary thereof in any wise notwithstanding. And my will is, and I do hereby direct, that in case all my sons shall refuse or decline to carry on the said trade or business, then, and in such case, I do hereby direct, that when all my said sons, W., F., T., and G., who shall live to attain the age of 28 years, shall have attained that age, and there shall be no after-born son or sons, or in case there shall be any after-born son or sons, when all my after-born sons, who shall live to attain the age

Upon the death of any son in the business before 28, leaving a widow or children his share in the 20,000*l.* immediately to be raised and invested, and not to wait till the other son or sons shall attain 28 years.

In case all the sons shall decline the business, then all the property and effects of the trade to be sold, and the 20,000*l.* to be raised

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and invested for the purposes aforesaid, and the residue of the money to be applied as the residue of the capital, stock, &c. are before directed to be applied.

of 22 years, shall have attained that age, the said trade, stock, and effects employed therein, shall be sold to the best advantage, and the debts due and owing to the said trade, shall be collected by my said executors, or the survivors or survivor of them, or the executors or administrators of such survivor. And from and immediately after such sale as last aforesaid, they, my said trustees, and the survivors and survivor of them, and the executors or administrators of such survivor, do and shall, by and out of the money which shall arise by such sale, and which shall be collected as aforesaid, lay out and invest the said sum of 20,000*l.* in the purchase of a competent share, or competent shares of the parliamentary funds of Great Britain, in their own names, or in the names or name of the survivors or survivor of them, or of the executors or administrators of such survivor, upon the trusts, and to and for the intents and purposes hereinbefore mentioned, expressed, and declared of and concerning the same, and shall and do apply the residue of the money which shall arise by such sale or sales in such and the same manner as the residue of the capital, stock, debts, and effects, are hereinbefore directed and applied. And in case all my sons, as well those already born, as those hereafter to be born, shall depart this life under the age of twenty-one years, then my will is, and I do hereby direct, that the said capital, stock, goods, debts, and effects, shall be forthwith sold and disposed of, or collected in such manner as is hereinbefore directed in case all my said sons should refuse or decline to carry on the said trade or business, and that the whole produce thereof shall be forthwith placed out, and invested in the purchase of a competent share or competent shares of the parliamentary funds of Great Britain, in the names or name of my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, upon such and the same trusts, for the benefit of my said wife and daughter, and their children, and my nephews and nieces as are hereinbefore mentioned, expressed, and declared of and concerning the stocks, funds, or securities, to be purchased with the said sum of 20,000*l.* in the event of all

And in case all the sons shall die under 21, the business to be sold, and the produce invested for testator's wife and daughters, and their children, and his nephews and nieces, as before directed, with respect to the 20,000l.

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All the residue of the testator's property, real and personal, to be sold, and the money applied in the same manner as the residue of the capital, stock, and effects, are before directed to be applied.

my sons dying without leaving a widow, him or them surviving, or any child or children who shall live to attain the age of 21 years. Testator then gives several pecuniary legacies and small sums, for charitable purposes. And as to, for and concerning all the rest, residue, and remainder of my estate and effects whatsoever and wheresoever, and of what nature, kind or quality soever the same may be, both real and personal, which I shall be seised or possessed of, interested in, or in any manner entitled unto, in possession, reversion, remainder, or expectancy, at the time of my decease, I give, devise, and bequeath the same unto my said trustees, their heirs, executors, administrators, and assigns, according to the nature and quality thereof, upon trust, to sell and dispose thereof, either by public sale or private contract, and convert the same into money as soon as conveniently may be after my interment, and add the same to the capital of my said trade or business, and employ the same therein in such and the same manner, and to stand and be possessed thereof, subject to the legacies hereby given, upon such and the same trusts, and to and for such and the same intents and purposes as are hereinbefore mentioned, expressed and declared, of and concerning the residue of my said capital, stock, debts, and effects. And for facilitating the sale of my estate and effects in the manner hereinbefore mentioned, I do hereby direct that the receipt and receipts of my said trustees, or of the survivors or survivor of them, or of the heirs, executors, or administrators of such survivor, shall from time to time be a good and sufficient discharge, and good and sufficient discharges to the purchaser or purchasers of the said premises so to be sold as aforesaid, or any of them, or any part or parts thereof, or to any other person or persons, paying to them any other sum or sums of money under the trusts of this my will, and to his, her, and their respective heirs, executors, administrators, and assigns, for so much money as shall be therein acknowledged, or expressed to have been received. And that such purchaser or purchasers, or other person or persons, his, her, or their heirs, executors, administrators, or assigns, shall not afterwards be answerable or accountable for any loss, misapplication, or non-application

No. 14. thereof, or any part thereof. (1) And I do hereby nominate, constitute, and appoint my said wife, together with the said (trustees), to be executrix and executors of this my will, and in case of the death of any two or more of them before the trusts of this my will shall be fully executed and performed, then I do nominate, constitute, and appoint my two eldest sons, for the time being, when they shall respectively have attained the age of 18 years, to be executors of this my will,

Executors appointed.

Substitutionary executors named.

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(1) There is an obvious propriety in this provision. Where such a clause is left out, the best way to cure the omission is for the purchasers to see the whole of their purchase-money invested in the 3 per Cent. Bank Annuities, in the name of the executors or trustees who may thereupon execute deeds, declaring the money so invested to be the same money for which the estates (describing them) were sold, and that the money is so invested on the trusts of the will; and each purchaser should have one part of such deed declaring the trusts of the purchase-money. The Bank books will always, on inspection, afford evidence of the sum's having been actually invested in such a quantity of Stock, which will correspond with the precise quantity mentioned in the declaration of trust, and together they will be sufficient proof of a proper application according to the will, so as to absolve the purchaser. It was the opinion of the late Mr. Serjeant Hill, that the purchaser would then have a safe title without a decree; but otherwise he would not be safe, because he has notice of the trust. To obtain a decree, if a decree be necessary, the trustees, or any person or prochein ami for the infant cestui que trusts, may file a bill to compel a specific performance of the contract by the purchasers, and then the court will direct and confirm the sale. But purchasers of leasehold or chattel estates or interests will be safe without any decree, notwithstanding the omission to make the receipts of the trustees discharges, if the trustees are also *executors*, for the property in such subjects always vest in the first place, notwithstanding the dispositions of the will, in the executors. A testator cannot prevent them from being assets in the hands of the executors to go in a due course of administration. The power of sale is annexed to their office, and the purchaser is never obliged to enter into the account, or enquire into the necessity of any sale. Whale *v.* Booth, 4 T. R. 625. Ewer *v.*

No. 14.

in the place and stead of such two or more of them, my said wife and the said trustees, as shall so die before the trusts of my said will shall be fully executed and performed, and with all the same power and powers, authority and authorities, to all intents and purposes whatsoever, as such executrix or executors, who shall so happen to die, had or might have under and by virtue of this my will, at the time of his or her death. And I do hereby declare my will to be, that it shall and may be lawful to and for my said wife and the said (trustees) and also to and for my said two eldest sons, when they shall severally become entitled to prove and shall have proved this my will, and the survivors or survivor of them, and the executors or administrators of such survivor from time to time, if need be, to renew the lease of my dwelling-house and premises wherein the said trade or business is now carried on, or to purchase the fee-simple thereof, or of any undivided part or share thereof, or to take any other dwelling-house, shop or shops, warehouse or warehouses, or other premises, at such rent or rents as they shall think proper, for the purpose of carrying on the said trade or business, and to hire and employ any servant or servants, clerk or clerks, or any other person or persons whomsoever, to be employed therein, at such salary or wages as they, my said trustees and executors for the time being, shall think proper, and to repose in such servant or servants, clerk or clerks, or other person or persons, so much and such confidence, trust, power, or authority, in the conducting and carrying on of the same trade or business, and in the management, care, and disposal of the stock employed or to be employed therein, and in

Power to the trustees to renew the lease of the testator's dwelling-house, or to purchase other premises, with full discretionary powers for managing the trade.

Corbitt, 2 P. Wms. 149. But the transaction must be clear of all fraud or collusion, for if it be tainted with these qualities the estate will be specifically followed into the hands of the purchaser. So where there is express notice of a debt of testator unsatisfied, and the sale is a contrivance between the purchaser and executor to defeat the debtor, the purchaser makes himself party to the devastavit; see Crane *v.* Drake, 2 Vern. 616. Nugent *v.* Gifford, 1 Atk. 463. Hill *v.* Simpson, 7 Vez. Jun. 152. And if such sale be without valuable consideration it falls within the statute, 13 Eliz. c. 5. Gilb. Eq. R. 111.

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No. 14. the receipt of any debt or debts to be contracted, in or by the carrying on the trade hereby directed to be carried on, as they my said trustees or the survivors or survivor shall in his,her, or their discretion think fit, provided that after any or either of my said sons shall become partners or partner in the said trade or business, such of them as for the time being shall be partners or partner therein, shall have a voice therein, as well as my trustees and executors for the time being, so as that in case of a difference in opinion, the majority of voices shall decide as hereinafter is mentioned; and also to adjust, settle, compromise and compound all accounts, reckonings, transactions, matters, and things, in which I shall be concerned or interested at the time of my decease, or which shall be opened or contracted, or shall arise after my decease, and to pay, on any evidences they shall think proper, any debts claimed from my estate, and also to dismiss any such servant or servants, clerk or clerks, or other person or persons; and (with such consent as aforesaid) to hire and employ any other or others in his, or their stead, and that from time to time, and as often as my said executors shall think proper. And I do hereby will, direct, and declare, that in all cases where my trustees, and executors for the time being, shall happen to differ in opinion, the matter of such difference shall be decided by the major part or number of them my said trustees and executors, and be acted upon accordingly. And I do hereby declare my will to be, that they my said executors, and their respective executors and administrators, shall not be answerable or accountable for any loss or damage which shall come or happen to the stock or capital to be employed in the said trade or business, by bad debts, decay of goods, suit or action, or suits or actions, in any court or courts of law or equity, or any other casualties or accidents whatsoever, or by reason of the trust and confidence which they or any of them shall or may place or repose in any servant or servants, clerk or clerks, banker, broker, or other persons with whom any part of the said trust-monies shall or may be deposited or lodged, for safe custody or otherwise, or for any other loss or damage which may happen about the execution of this my will, or all or any of the trusts hereby in them reposed; and that they my said

If the trustees and executors differ in opinion, the matter in difference to be decided by the majority.

trustees and executors, and their respective executors and administrators, shall not be charged or chargeable with or for any sum or sums of money, other than such as shall actually and respectively come to his, her, or their hands by virtue of this my will. And my will is, and I do hereby further direct, that it shall and may be lawful to and for my said trustees and executors, and each and every of them, by and out of all or any of the monies which shall come to their or any of their hands, by virtue of this my will, to deduct, retain to, and reimburse themselves, himself, and herself, and to allow his, her, or their, co-trustee, or co-trustees, all such costs, charges, and expences, as they respectively shall or may sustain, expend, or be put unto, in or about the execution of all or any of the trusts, hereby in them reposed, or in anywise relating thereto. And I do hereby revoke and make void all former and other wills by me at any time heretofore made, and do declare this only to be my last will and testament. No. 14.

In witness, &c.



No. 15.

A Will disposing of real and personal Property by a Testator leaving no Family.

THIS is the last will and testament of me A. B. of, &c. First, I will that all such debts as I shall justly owe at the time of my decease, and my funeral and testamentary charges and expences, be in the first place paid by my executors hereinafter named. I give, and devise unto C. D. of, &c. all and every my messuages, lands, tenements and hereditaments, whereof I am seised in fee, situate, lying and being in

No. 15. ——— in the county of ——— and now or late in the several tenures or occupations of ——— and ——— or one of them, their, or one of their assigns, lessees or undertenants; to have and to hold all and every the said messuages, lands, tenements hereditaments and premises unto and to the use of the said C. D. and his heirs for ever. I give, devise and bequeath unto E. F. of ——— in the county of ——— all my copyhold messuages, lands, tenements and hereditaments, (which I have duly surrendered to the use of my will) situate, lying and being in the said county, and which now are or late were in the several tenures or occupations of ——— and ——— or one of them, their or one of their assigns, lessees or undertenants, to have and to hold all and every the said last mentioned messuages, lands, tenements, hereditaments and premises, with their, and every of their appurtenances, unto and to the use of the said ———, and the heirs of his body lawfully to be begotten; and for default of such heirs, then to the right heirs of me the said A. B., for ever. I give, devise and bequeath unto ——— of ———, in the county of ——— ———, Esq. all those my messuages or tenements, with their and every of their appurtenances, now in the several tenures or occupations of ——— and ———, or their several lessees, undertenants or assigns, situate, standing and being in the parish of ——— in the county of ———, and all that my other messuage or tenement with the appurtenances, situate, standing and being in the said parish of ———, and near or adjoining to the said two last mentioned messuages or tenements, and now called, or commonly known by the name or sign of the ——— and heretofore in the tenure or occupation of ——— his undertenants or assigns, but which is now untenanted; and also all other my messuages or tenements, ground and hereditaments in ——— aforesaid with their appurtenances, to have and to hold all and every the said last mentioned messuages or tenements and premises, with their appurtenances (subject nevertheless to, and charged and chargeable with the annuity, yearly rent or sum of ———*l.* hereinafter mentioned) unto him the said ——— and his assigns, for and during the term of his natural life: and from and immediately after his decease I

give, devise and bequeath all and every the same messuages or tenements and premises, with their and every of their appurtenances (subject to and charged and chargeable with the annuity hereinafter-mentioned) unto and to the use of ——, in the county of ——, and the heirs of his body lawfully begotten, or to be begotten; and for default of such heirs, then to my own right heirs for ever; and I do hereby give, devise and bequeath unto ——, wife of ——, and her assigns, for and during the term of her natural life, one annuity or clear yearly rent or sum of ——*l.* of lawful money of Great Britain, free and clear of and from all deductions or abatements, for or in respect of any taxes, charges, rates, assessments, or impositions whatsoever, to be issuing and payable out of all and every the said last-mentioned messuages, and tenements and premises, and to be paid and payable by equal half-yearly payments, at the two most usual feasts or days of payment in the year, that is to say, the feast of the Annunciation of the blessed Virgin Mary, and Saint Michael the archangel; the first payment thereof to be on such of the same feasts as shall first and next happen after my decease; and I do hereby charge and subject all and every the same messuages or tenements and premises, to and with the payment of the said annuity, yearly rent, or sum of ——*l.* accordingly. And my will is, that in case the said annuity, yearly rent, or sum of ——*l.* or any part thereof, shall be behind or unpaid by the space of 28 days, next over or after either of the aforesaid feasts whereon the same is hereinbefore directed to be paid as aforesaid, that then and so often it shall and may be lawful for the said ——, (the annuitant) and her assigns, to enter and distrain upon all and every or any part of the said premises charged with the said annuity as aforesaid, and to dispose of the distress and distresses then and there found, according to law, as in the case of distresses taken by landlords for rents reserved upon leases for years, to the intent that thereby, or otherwise, the said annuity, yearly rent, or sum of ——*l.* and every part thereof then in arrear, and all costs, charges, and expences, occasioned by the non-payment thereof, may be fully paid and satisfied. I give, devise, and

No. 15.

Testator devises an annuity to be issuing out of the messuages, &c. with power of distress.

No. 15. bequeath unto ——, of ——, in the county of ——, all that my messuage or tenement (being part freehold and part leasehold) with the appurtenances, situate, standing and being in ——, in the parish of ——, and now or late in the possession or occupation of ——, his under-tenants or assigns; and also all that my freehold piece or parcel of ground, lying or being in or near an open field, commonly called or known by the name of the ——, in the parish of ——, and now or late in lease to ——, and all those messuages, tenements, erections and buildings thereupon, or upon any part thereof now erected and built, and erecting and building, with their and every of their respective appurtenances; to have and to hold the said messuages or tenements, and piece or parcel of ground and premises last hereinbefore devised, with their and every of their respective appurtenances, unto the said ——, and her assigns, for and during the term of her natural life, (she and they keeping the same in good repair); and from and immediately after her decease, I give, devise and bequeath the same messuages or tenements, pieces or parcels of ground and premises, with their and every of their respective appurtenances, unto the said ——, and the heirs of his body lawfully to be begotten; and for default of such heirs, then to my own right heirs for ever. I give, devise, and bequeath unto the said ——, all that my messuage or tenement, with the appurtenances in ——, which I hold by, or under a lease from ——, and all my estate, right, title, term and interest of and in the same premises, with the appurtenances; to have and to hold unto the said ——, his executors, administrators and assigns, to and for his and their own use and benefit. I give and bequeath unto ——, of, &c. the sum of ——*l.* of lawful money of Great Britain, to be paid within three calendar months next after my decease. I give and bequeath unto ——, ——*l.* to buy him mourning. (Here the testator gave several other legacies.) All the said last-mentioned legacies I will and direct to be paid within one calendar month next after my decease. I give and bequeath the sum of ——*l.* of like money, unto the managers of the —— fund in ——, to be disposed of as they shall think fit,

No. 15.

and the receipt of the treasurer for the same fund for the time being, to be a sufficient discharge to my executors for the same; and I give and bequeath the sum of ——*l.* of like money unto the managers and trustees of the charity-school in ——, for the use and benefit of the said charity-school; and I will that the receipt of two or three such managers or trustees shall be a sufficient discharge to my executors for the same. I give and bequeath the sum of ——*l.* of like money to and for the benefit of the poor members of the society or congregation of ———, in ———, to be distributed in such manner and proportions, and to such objects as my executors hereinafter-named, or the survivor of them, shall think fit. I give and bequeath the sum of ——*l.* of like money unto ——, of, &c. and ——, of, &c. their executors and administrators, upon the several trusts, and to and for the several purposes hereinafter-mentioned, and declared of and concerning the same, (that is to say) upon trust that the said —— and ——, (the trustees) and the survivor of them, his executors or administrators, shall and do, in their or his own names or name, or in the names of themselves or himself, and of such other person or persons as he or they shall think fit, from time to time put and place out the said sum of ——*l.* in or upon some or one of the public or parliamentary stocks or funds of Great Britain, or on real securities at interest, according as they my said trustees, or the survivor of them, shall in his or their discretion or discretions think fit, and shall and do pay, apply and dispose of the clear yearly dividends, interest and produce thereof, as the same shall from time to time arise and be received (over and above what shall be sufficient to answer and pay the costs and charges attending the execution of the trusts by me hereby directed concerning the same ——*l.*) unto and for the use and benefit of the minister or pastor for the time being, of the society or congregation of ——, in ——, for so long time as the said society or congregation shall subsist as a religious society of Protestant dissenters, and continue to meet and assemble together for the worship of God in their present place of religious worship, or elsewhere in —— aforesaid, or the neighbourhood thereof. Provided nevertheless, and my will and mind is, and I do

Charitable bequests.

To trustees for the benefit of a society of Protestant dissenters.

No. 15. hereby expressly will, declare and direct, that in case at any time hereafter the said society or congregation shall be dissolved and broken up, or that the laws and statutes of this realm shall disallow and prohibit the same society or congregation from meeting together for religious worship, as Protestant dissenters are now by law tolerated to do, then and in either of the said cases, and when and as soon as the same or either of them shall happen, the said sum of ——*l.* and all the interest and produce from thenceforth to arise and be received, shall sink and fall back into the residuum of my personal estate by me hereinafter given and bequeathed, and shall be, go, and remain to and for the use and benefit of such person or persons, who, for the time being, should or would have been entitled unto such residuum, by virtue of, and under this my will. I give and bequeath all my rings whatsoever, and such pieces of my plate as are marked with my own name and arms, and my household goods and furniture, and my wearing apparel, unto the said ——, and all my books, and all other my plate (not hereinbefore bequeathed) and all my ready money and securities for money, arrears of rent, debts to me owing, and all my stocks in any of the public companies or funds, and all other my goods, chattels and personal estate whatsoever (not herein-before by me otherwise bequeathed or disposed of) I also give and bequeath unto ——, of, &c. to and for his own use and benefit; and I do hereby make, ordain, constitute and appoint —— and ——, executors of this my last will and testament; and I give and bequeath unto the said ——, the sum of ——*l.* for his care and trouble as one of my executors and trustees. I do hereby authorise, impower, and direct my said executors, and the survivor of them, his executors and administrators in the mean time, from and after my decease, until the said —— shall attain his age of 21 years, to manage and improve the estate and fortune of him the said ——, by me hereby given him for his use and benefit, and to lease all or any part of his freehold, copyhold, or leasehold estates, and to lend and place out upon security or securities at interest, or to lay out in the public companies or funds, or otherwise improve according to his or their discretion or discretions, all or any part of the monies

Plate and household goods to —.

belonging to or arising from the said estates and fortune of the said ——, and to pay unto and account with him the said ——, for all such rents, interests, produce and improvements, as shall arise from or be made of, and produced by the said estates, monies and fortune hereby given, devised and bequeathed to him, when he shall attain his age of 21 years. And my will is, and I do hereby expressly declare, that my said executors and trustees, or either of them, their, or either of their executors or administrators, shall not be charged or chargeable with, or accountable for more of the aforesaid monies and estates, than he or they shall actually receive, or shall come to his or their respective hands, by virtue of this my will, nor with or for any loss which shall happen of the said monies and estate hereby by me given to the said ——, or of the aforesaid sum of ——*l.* or of any part thereof, so as such loss happen without their wilful default and neglect; nor the one of them for the other of them, or for the acts, deeds, receipts, defaults or disbursements, the one for the other; and also that it shall and may be lawful for them my said executors, and each of them, their and each of their executors and administrators, in the first place, by and out of the said premises hereby devised to the said ——, respectively to deduct and reimburse him and themselves respectively, all such loss, costs, charges and expences, as he or they, or any of them, shall sustain, expend, or be put unto, for or by reason of the performance of this my will, or the trusts hereby in them reposed, or the management and execution thereof respectively, or any other thing in anywise relating thereunto; and, lastly, I do hereby revoke, &c. No. 15.

In witness, &c.

No. 16.

Will by a Citizen of London, containing Provisions for Daughters and a Son; with Charities, and a provision for keeping a Tomb in repair.

Recites a covenant to give or leave the sum of —l. to his married daughter and her husband, in lieu and full of all her claim under the custom of London.

THIS is the last will and testament of me, A. B. of ——. First, I desire that my body may be interred in the most private manner, at the discretion of my executor hereinafter named; and whereas my daughter ——, wife of ——, had only ——l. at her marriage; but I have lately paid and given to the said ——, the further sum of ——l. and have also covenanted and agreed to give or leave to them the said ——, and —— his wife, or the survivor of them, or their children, or issue, or other representative, either in my lifetime, or in and by my last will and testament, at the time of my decease, the further sum of ——l. which they, the said ——, and —— his wife, have covenanted and agreed to accept in full for the advancement and preferment of her the said ——, out of all such part and share as they, or either of them, can or may, or could or might claim or pretend to, of, in, or out of all, or any part of my personal estate, by virtue of the custom of the city of London, or otherwise (except such part thereof as I should or might freely and voluntarily give or leave to them or either of them by my last will and testament, or otherwise:) Now therefore, I do hereby give and bequeath the sum of ——l. of lawful money of Great Britain, to be paid by my executor hereinafter named, within three calendar months next after my decease, unto the said ——, and —— his wife, or the survivor of them, or to such other person or persons, as for the time being shall be intitled to receive the same, accord-

Bequeaths such sum according to the covenant.

No. 16.

ing to the true intent and meaning of my said covenant and agreement in that behalf entered into by me, and in full satisfaction and discharge of and for the same covenant and agreement. I give and bequeath unto such persons whose names shall, at the time of my decease, be found expressed or contained in any list, note, or other writing, written or signed by me, the several and respective sum and sums of money which shall be therein set down, mentioned, or expressed to be by me given to them respectively. I give and bequeath unto my nephew, ——, of, &c. in the county of ——, and ——, brother of the said ——, and to their heirs and assigns, for and during the natural life of my said daughter ——, an annuity or yearly rent-charge of ——*l.* of like money, to be yearly and every year issuing and payable out of all my manors, messuages, &c. in the county of ——, upon trust, nevertheless, that the said ——, and —— shall and do pay, apply and dispose of the said annuity or yearly rent-charge of ——*l.* unto such person and persons, and for such uses and purposes as she the said ——, shall from time to time, notwithstanding her coverture, by any note or notes in writing, under her hand, direct or appoint, to the intent that the same may not be at the disposal of, or subject or liable to the control, debts, forfeitures or engagements of her present, or any after-taken husband, but only at her own sole and separate disposal, and for her own sole and separate use and benefit. (The like to two other daughters.) And it is my will and desire that the aforesaid annuities shall be paid to my said daughters, ——, by two equal half-yearly payments, on the two most usual feasts or days of payment in the year (that is to say) the feast of St. Michael the Archangel, and the Annunciation of the blessed Virgin Mary in every year; the first of the said half-yearly payments to begin and be made on such of the said feasts as shall first happen next after my decease: and my further will is, that it shall and may be lawful to and for my said trustees, their heirs and assigns, from time to time, in case of non-payment of the said annuities respectively, or any of them, or any part of them, to raise the same by distress upon all or any part of the premises charged therewith, together with the costs and charges of

Gives to such persons as shall be named in any list or note to be written or signed by him, the sums therein expressed.

Gives annuities to his daughter, to be issuing out of lands, &c.

No. 16.



Makes a furtherprovision for his three daughters, out of East India stock.

such distress. And whereas I have already sufficiently provided for my said daughters, —— and ——, at the time of their respective marriages, with their now husbands, and for which I have all their discharges; and have now likewise sufficiently provided for my said daughter ——, in manner aforesaid; yet nevertheless, as a further provision for my said three daughters, for their separate use (over and above the several annuities hereinbefore given for their benefit, for their respective lives as aforesaid) I do hereby give and bequeath unto the said —— and ——, their executors and administrators, ——*l.* capital stock in the funds of the united East India company, upon the trusts hereinafter mentioned concerning the same (that is to say) As to one full third part thereof, upon trust, that they my said trustees, their executors or administrators, shall and do pay, apply and dispose of the yearly dividends, interest, and produce thereof, as the same shall, from time to time (during the natural life of my said daughter ——) arise or be received, into the proper hands of her my said daughter ——, or otherwise to permit and suffer her my said daughter ——, to receive the same to and for her own sole and separate use and benefit, to the intent that the same may not be at the disposal of, or subject or liable to the control, debts or engagements of her present, or any after-taken husband, but only at her own sole and separate disposal; and upon further trust, that they my said trustees, their executors or administrators, shall and do, from and after the decease of my said daughter ——, transfer and dispose of the said third part of the said ——*l.* stock, unto all and every, or such one or more of the children or grand-children of her the said ——, which shall be then living, in such parts, shares and proportions, manner and form, as she, notwithstanding her coverture, or whether she shall be sole or married, by her last will and testament in writing, or any writing purporting to be her last will and testament, or any codicil thereto, to be by her signed, sealed, and published in the presence of three or more credible witnesses, shall direct, limit, give or appoint the same; and in default thereof, then unto and amongst all and every the children of her the said ——, which shall be living at the time of her decease, equally to be divided between them (if

No. 16.

more than one) share and share alike, and the child or children of such of them as shall be then dead, in manner aforesaid, and such child or children to have his, her, or their father's or mother's share only. Provided always, nevertheless, that in case my said daughter —— shall have no such children or grand-children living, at the time of her decease, then my said trustees, their executors or administrators, shall assign and transfer the said third part of the said ——*l.* stock, unto ——, his executors and administrators, to and for his and their own use and benefit; and as to one other third part of the said ——*l.* capital stock, upon trust, that they my said trustees, their executors or administrators, shall and do pay, apply and dispose of the yearly dividends, interest, and produce thereof, as the same shall from time to time, (during the life of my said daughter ——,) (another daughter) arise or be received, unto the proper hands of her the said ——, or otherwise, &c. (as before.) And as to the remaining third part of the said ——*l.* stock, upon trust, &c. (for another daughter's benefit, as before.) And my will is, that the respective receipts of my said several daughters alone, under their respective hands, as well for their said several and respective annuities or rent-charges, as for their several parts and shares of the yearly dividends, interest and produce of the said East India stock, shall from time to time, notwithstanding their respective covertures, be good and sufficient discharges to the person or persons paying the same annuities and dividends, interest or produce, for so much thereof for which such receipts shall respectively be given. Provided always, and my will is, that my said three daughters, and their respective husbands shall, (in case my executor requires it) give him, within two calendar months next after my decease, a further and sufficient release and discharge from all their respective further claims and demands whatsoever, out of my said estate, by virtue of the said custom of the said city of London, or otherwise; and in case of their neglect or refusal so to do, then all and every of the gifts, devises, annuities, legacies and appointments by this my will made or given, to or for the benefit of them, or such of them so neglecting or refusing, shall cease and be void, for the benefit

Receipts of the daughters to be discharges.

Daughters to release all claims by virtue of the custom of London.

No. 16.

If the E. I. stock should be paid off, the money to be laid out in other securities upon the like trusts.

of my executor, his executors and administrators. And in case the said East India stock, or any part thereof, shall be redeemed or paid off, then my will is, that my said trustees, their executors or administrators, shall and do lay out the monies to be received for and in lieu of the stock so redeemed or paid off, in such stocks, funds, or other public or private securities, as my said three daughters shall respectively agree to; and that the monies so received and laid out, shall be subject to the same trusts, and for the same, or the like intents and purposes as are hereinbefore declared, of and concerning the respective shares of my said daughters, of and in the said ——*l.* East India stock. I do hereby direct and appoint, that my executors do with all convenient speed after my decease, out of my personal estate, lay out so much as will be sufficient to purchase as much stock in any one of the public funds, or parliamentary stocks of Great Britain, as will produce the annual sum of ——*l.* and do and shall be possessed of and interested in such last-mentioned stocks, funds, and securities, in trust for the churchwardens and overseers for the time being, of the said town of ——, for the placing out one or more poor boy or poor boys, born or to be born in the said town and parish of ——— aforesaid, as far as the said yearly sum of ——*l.* will extend, to be an apprentice or apprentices to some handicraft trade, or a mariner or mariners, and that the children of such persons of the said town and parish, who have been very industrious in their callings or way of living, for the support and maintenance of their families, and have not been in the poor's rate, shall have the preference to all others. Provided nevertheless, that in case the monument erected in the parish church of ——— aforesaid, by my brothers and myself, to perpetuate (as much as in us lay) the memory of our dear parents, shall at any time want repairing, or the gilt letters upon the same shall be defaced, and become not legible, then and so often as the same shall happen, it is my will, that so much money be from time to time taken out of the said yearly sum of ——*l.* as shall be sufficient to repair the said monument, and make the said gilt letters thereon legible, and from time to time to maintain and preserve the same in such condition; and in such years wherein such re-

Provision for keeping the tomb of testator's parents in repair.

pairs shall be made, only the overplus of the said yearly sum (above what shall be sufficient for such repairs,) shall be employed towards placing out such poor boy, or poor boys, in manner aforesaid. And whereas my brother ———, late of ———, merchant, deceased, did (among other things,) by his will give to me the sum of ——*l.*, to be by me given away, distributed, divided and disposed of amongst such of my children, or other relations, in such sort and manner, and in such shares, and at such times, as I should think fit; now my will is, and I do hereby direct that the said sum of ——*l.* shall be distributed, divided and disposed of by my executor hereinafter named, within six months after my decease, to and amongst such of my children, and in such proportions and manner, as hereinafter mentioned and expressed, (that is to say) to my said daughter ———, the sum of ——*l.* (part thereof); to my said daughter ———, the like sum of ——*l.* (other part thereof); to my said daughter ———, the like sum of ——*l.* (other part thereof); and all the residue of the same ——*l.* to my daughter ———. And I give, devise and bequeath all and every my manors, &c., in the county of ———, or elsewhere within the realm of England, as well freehold, as copyhold and leasehold for lives, with their and every of their appurtenances, unto and to the use and behoof of my son ———, his heirs and assigns for ever, subject nevertheless as to my said estate in the said county of ———, to the aforesaid annuities, or yearly rent charges by me hereinbefore given thereout, or charged thereon, in trust, and for the benefit of my daughters, for their respective lives as aforesaid, or such of them as shall be subsisting. [Residuary devises and bequests, appointment of executors, and revocatiou of all former wills.]

No. 16.

Distribution of money left by his brother, according to a power given to the testator for that purpose, among his (the testator's) children.

In witness, &c.

No. 17.

Will of a married Woman, by virtue of a Power.

Recites part of a settlement creating the power.

THIS is the last will and testament of me A. B., wife of C. D., of, &c. Esq. Whereas, in and by a certain indenture of three parts, bearing date on or about the ——— day of ———, and made or mentioned to be made between the said C. D., of the first part, me the said A. B., by my then name of ———, of the second part, and E. F., of, &c. merchant, and G. H., of, &c. of the third part, and made previous to, and in contemplation of my marriage with the said C. D., my now husband, divers leasehold messuages, &c. Bank stock, and East-India bonds of me the said A. B., were thereby assigned and transferred unto the said E. F., and G. H., their executors, administrators and assigns, in manner therein expressed, in trust nevertheless for the sole and separate use and benefit of me, the said A. B., and with full and absolute power for me, from time to time, notwithstanding my coverture, and whether I should be sole or married, by any writing or writings, under my hand and seal, attested by two or more credible witnesses, or by my last will and testament in writing, or any writing or writings purporting to be my last will and testament, to be by me signed, sealed, and published and declared in the presence of the like number of witnesses, to dispose of the said leasehold messuages, &c. Bank stock, and East-India bonds, or any part thereof, to such person or persons, and in such proportions and manner as I should think fit, as in and by the said indenture, relation being thereunto had, will more fully appear. Now in testimony of the sincere love and affection which I have, and justly bear, towards the said C. D., my dear husband, and by virtue of the power and powers, authority and authorities, to me reserved, and given in and by the said in part recited indenture, and of all other power and powers, authority

Executes the power in favour of her husband.

No. 17.

and authorities, anywise enabling me thereunto, I, the said A. B. do by this my last will and testament, or writing, purporting to be my last will and testament, to be duly signed, sealed, published and declared in the presence of the persons whose names are hereunder written as witnesses thereto, give, devise, bequeath, direct, limit and appoint all and every the said leasehold messuages or tenements, Bank stock, East India bonds, and all other my messuages, &c. stocks, bonds, goods, chattels, monies, and estate whatsoever and wheresoever, and of what nature or kind soever, whereunto I am intitled at law or in equity, or whereof I have any power to dispose, and all my estate and interest therein, unto my said husband, the said C. D., his heirs, executors, administrators and assigns respectively, to and for his and their own use and benefit absolutely; and I do hereby direct my said trustees, in the said recited indenture mentioned, to convey, assign and transfer over the same, and every part thereof to him and them accordingly; yet nevertheless my mind and will is, and I do hereby desire and request my said husband to give (out of what I have hereinbefore bequeathed to him,) unto his daughter ———, by his former wife, (in case he shall think fit, and in his judgment she shall prove deserving of the same) the sum of ——*l.* of lawful money of Great Britain, to be paid to her at such time or times, and in such manner or proportions, and under such restrictions in all respects, as he shall direct, and think may be most for her benefit. And I do hereby constitute and appoint my said husband, C. D., sole executor of this my last will and testament; and I earnestly desire of him that I may be buried where he himself intends to be buried, and that he would give proper directions in his will for that purpose, in case he should survive me; and, lastly, I do hereby revoke, &c. In witness, &c.

Signed, &c.

No. 18.

Short Will of an unmarried Woman.

THIS is the last will and testament of me, A. B., of, &c. First, I desire to be decently and privately buried in the church or church-yard belonging to the parish in which I shall happen to die, without any funeral pomp, and with as little expence as may be; and I give and bequeath unto the poor which receive alms of that parish in which I shall happen to die, the sum of ——*l.* to be distributed in such proportions and manner, as my executrix hereinafter named, shall think fit; also, I give and bequeath unto such of the children of my late sister ———, as shall be living at the time of my decease, the sum of ——*l.*, of lawful money of Great Britain, to be equally divided between them, share and share alike, and to be paid to them at their respective ages of twenty-one years, or days of marriage, which shall first happen; and in case any of them shall happen to die before the age of twenty-one years, or marriage, then I give and bequeath the share or shares of her or them so dying, to the survivors of them, to be equally divided between them, payable as aforesaid; but if only one of my said sister's children shall live to attain the age of twenty-one years, or be married, then to such survivor. Also, I give to my servant ———, the sum of ———*l.*, of like lawful money, and all my wearing apparel, in case she shall be living with me at the time of my decease, but not otherwise. And I give and bequeath all my third part, share and interest of and in the family pictures which were my late mother's, unto my sisters ——— and ———, for their lives, and the life of the survivor of them, and after the death of the survivor of them, I give and bequeath my said part and share of the said pictures unto the eldest son of my

late sister, ————, which shall be then living, and I desire that he will never sell or dispose of any of them, but that they may always remain and continue in the family; also, all the rest and residue of my goods, chattels and estate whatsoever and wheresoever, or of what nature, kind or quality soever, (after payment of my just debts, legacies and funeral expences,) I give and bequeath the same and every part thereof, unto my said sister ————, whom I do hereby make sole executrix of this my last will and testament; and I do hereby revoke, &c. In witness, &c. No. 18.



No. 19.

Short Will of personal Estate for an only Daughter.

THIS is the last will and testament of me, A. S., of –, widow. First, I will and direct that all my just debts and funeral expences be fully paid and satisfied; and subject thereto, and to the payment of the three several pecuniary legacies of ———*l.* each, hereinafter bequeathed, I give, devise and bequeath all my goods, chattels, plate, jewels, monies, securities for money, South Sea annuity stock, debts, and other personal estate, of what nature or kind soever, and wheresoever, unto A. B., and C. D., of ——, and to their executors and administrators, upon the trusts, and for the purposes hereinafter mentioned, (that is to say) in trust that they the said A. B., and C. D., and the survivor of them, and the executors or administrators of such survivor, do and shall, by and out of the interest, dividends and produce of my said estate and effects, pay and apply the sum of 50*l.* a year, to and for the maintenance and education of my daughter ————, in such manner as they shall think fit, until she attains the age of twenty-one years, or shall be

No. 19. married; and upon her attaining that age, or day of marriage, which shall first happen, to pay, assign and set over the said trust estate and effects, and all interest and dividends due thereon, and produce thereof, and all securities whereon the same shall then be placed out or invested, to her, my said daughter, for her own sole use and benefit absolutely for ever: but in case my said daughter shall happen to die before she attains the age of twenty-one years, and unmarried, then I give 200*l.*, part of the said trust estate, to ten poor widows of clergymen of the church of England, who are of good life and conversation, and proper objects of charity, to be equally divided amongst them, share and share alike, at the discretion of my said trustees, or the survivor of them; and all the rest and residue of my said estate and effects I will and direct shall go to and be enjoyed by my nearest of kin, in the same manner and proportion as the same would pass, and be distributable by the statute for distribution of intestates' estates. And I do hereby constitute and appoint the said A. B., and C. D., executors of this my last will and testament, hereby revoking, &c.

No. 20.

A comprehensive Devise and Bequest of various descriptions of Property to Trustees, for the Sale and Accumulation of the Produce.

I GIVE, devise, and bequeath all my stocks, funds, money, mortgages, and all lands, tenements, and hereditaments whatsoever, to which I am beneficially intitled, or which have been conveyed to, or vested in me by way of mortgage, security, or trust, and all my estate, right, title, and interest

of, in, and to such mortgaged premises, and all securities for money, and all my goods, chattels, and personal estate whatsoever, and wheresoever, and of what nature or kind soever, not otherwise by me disposed of, after and subject to the payment of my just debts, funeral expences, and the several legacies, bequests, and dispositions by me given, bequeathed, or made, or hereafter to be given, bequeathed, or made, and all my estate and interest therein, unto the said —— and —— their heirs, executors, and administrators respectively, according to the several natures and qualities of the same, upon the trusts following, (that is to say) upon trust, that they my said trustees, and the survivor of them, and the heirs, executors, administrators and assigns of such survivor, do and shall stand and be seised and possessed of the estates vested in me as a trustee, upon the trusts thereof respectively, and to re-convey, assign, and dispose of the mortgaged lands, tenements and hereditaments, when the principal and interest thereby secured respectively are paid off, and receive the principal and interest, which shall be due therefrom respectively, and give receipts for the same when paid; and also do and shall sell and dispose of all the real estates, to which I am beneficially entitled, and of which I have power to dispose, and also all the leasehold estates that I may hold at the time of my decease, from time to time, as they shall find purchasers for the same, or do and shall sell the same at public auction, or otherwise, at their discretion, subject nevertheless and without prejudice, to the privilege hereinbefore given to my said wife, of occupying, during her life, such of my leasehold houses as may be in my own occupation at the time of my decease; and also shall and do make sale of such other parts of the residue of my personal estate as shall be saleable. And I hereby declare, that the receipt or receipts of the said ——— and ———, or the survivor of them, or the executors or administrators of such survivor, shall be effectual discharges for so much money as shall be therein acknowledged or expressed to have been received. And I do hereby declare my will to be, and direct that the said ——— and ———, and the survivor of them, and the executors or administrators of such survivor, shall and do from time to time place out and invest No. 20.

No. 20. the monies which shall arise by sale of my real estate, and such parts of my personal estate as are saleable, including the leasehold estates directed to be sold as aforesaid, and also such monies as shall be collected, received, or got in from the other part of my personal estate as aforesaid, and the intermediate dividends, interest, and proceeds thereof, in the stock of the Bank of England, or on real or government securities, or in some of the public funds, in the names of the said ——— and ———, or the name or names of the survivor of them, or the executors or administrators of such survivor; which securities and funds, and all other securities and funds, in or upon which all or any of the said trust-monies, or any other trust-monies which shall come to their, or any of their hands, under or by virtue of this my will, or the trusts or powers herein expressed, and not hereinbefore directed to be otherwise disposed of, shall be invested, it shall and may be lawful to and for my last-named trustees, or the survivor of them, or the executors or administrators of such survivor, to alter and transpose at discretion. And I do hereby declare my will to be, that the dividends, interest, and proceeds of all such securities and funds, shall from time to time be accumulated and laid out on such securities or funds as aforesaid, in the names of the said ——— and ———, or the name or names of the survivor of them, or of the executors or administrators of such survivor, and that a like disposition shall be made of the dividends, interest, and proceeds of the securities and funds, in or upon which such accumulated dividends, interest and proceeds shall be so invested, and so from time to time, with respect to the future accumulated dividends, interest, and proceeds of such several and respective securities and funds, and of such other securities and funds, in or upon which any accumulated dividends, interest, and proceeds shall be invested, but so as no such accumulation be carried on or made beyond the term of 21 years, to be computed from the time of my decease (1). And my will is, and I do hereby further de-

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Origin of, and observations upon the

(1) The great question as to the ultimate period to which these trusts for accumulation might be extended, (which depended upon the extent of time during which the vesting and power of alienation

No. 20.

clare and direct, that the said ——— and ———, and the survivor of them, and the executors and administrators of such survivor, shall and do, from time to time, as convenient purchases shall be found, make sales of a competent part of the securities and funds, in or upon which the several and respective trust monies last-mentioned shall be in-

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Accumulation Act.

of property might be legally suspended,) was determined in the much agitated, and solemnly decided case of Thelluson *v.* Woodford, see 4 Vez. Jun. 227. and 11 Vez. Jun. 112. In which case there was a devise of real estates of the annual value of near 5000*l.*, and other estates directed to be purchased with the residue of the personal estate, amounting to above 600,000*l.* to trustees, and their heirs, &c., upon trust, during the lives of the testator's sons, A., B., and C., and of his grandson D., and of such other sons as A. then had, or might have, and of such issue as D. might have, and of such issue as any other sons of A. might have, and of such sons as B. and C. might have, and of such issue as such sons might have as should be living at his decease, or born in due time afterwards, and during the life of the survivor, to receive the rents and profits, and from time to time to invest the same, and the produce of timber, &c. in other purchases of real estates; and after the death of the survivor of the said several persons, that the said estates should be divided into three lots, and that one lot should be conveyed to the eldest male lineal descendant then living of A., in tail male; remainder to the second, &c., and all and every other male lineal descendant or descendants then living of A., who should be incapable of taking as heir in tail male of any of the persons to whom a prior estate was limited, successively in tail male; remainder in equal moieties to the eldest, and every other male lineal descendant or descendants, then living, of B. and C., as tenants in common in tail male, in the same manner with cross remainders; or, if but one male lineal descendant, to him in tail male; remainder to trustees, their heirs, &c. The other two lots were directed to be conveyed to the male descendants of B. and C. respectively in the same manner, and with similar limitations to the male descendants of their brothers, and to the trustees in fee; and it was directed that the trustees should stand seised, upon the failure of male lineal descendants of A., B., and C., as aforesaid, upon trust, to sell and pay the produce to his Majesty, his heirs, and successors, to the use of the sinking fund: the accumulation, till the purchases or sales

No. 20. vested, or call in a competent part of such trust monies, and lay out and invest the same from time to time in the purchase of freehold manors, messuages, farms, lands, tenements or hereditaments, of a clear and indefeasible estate of inheritance in fee-simple, in possession, situate, arising, or being in some convenient place or places in that part of

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could take place, to go to the same purpose; with a direction that all the persons becoming entitled, should use the surname of the testator only.

The validity of this will was opposed on several grounds, viz.—*as morally vicious*, being a contrivance of a parent to exclude every one of his issue from the enjoyment of even the produce of his property for nearly a century, and therefore an abuse of the allowance of the law for enabling persons to provide for the reasonable occasions of their families.—*As politically injurious*, being calculated to keep an immense property during the time aforesaid unproductive, and at the end of that period to create a fund, the revenue of which would be greater than the civil list; the probable amount of the accumulated fund of one third being 19,000,000*l*., and in case of a minority at the end of the period lasting 10 years, 10,802,373*l*. And should the *whole* property centre in one person, with a minority of 10 years, the whole accumulated fund would be 32,407,1[illegible]0*l*.—*As going beyond the legal boundary*, since in all the other cases, the lives during which the suspence was to be continued, were of those immediately connected with, or immediately leading to, the person in whom the property was first to vest.—*As a fraud upon the rule*, since by assigning for the period of suspence, a number of lives, whose average duration was equal to a given number of years, and thus indirectly making years, not lives, to constitute the period of suspence, property might be suspended for a century.—*As attempting to protract the accumulation during the lives of persons unborn at the time of the testator's decease*, the testator having included the lives of persons to be born within due time after his decease; and though a child in ventre sa mere might be considered as in existence, where the limitation was for his own benefit, and he was to take, when born, in the character of heir, or where the subject of the trusts was personal estate, yet no cases could be mentioned, the subject being real property, in which a child in ventre sa mere has been held to be in existence, for any purpose except to limit the estate of the first devisee, or for the actual benefit of the child

Great Britain called England, free from incumbrances, except chief or quit rents, or other inconsiderable outgoings, together with such copyhold hereditaments, as may be intermixed, or be necessary or convenient to be held and enjoyed therewith, if any such there shall be, and the person or persons, who for the time being shall, by virtue of, or under the No. 20.

himself, being the substituted devisee.—*An objection was also taken upon the grammatical construction.* But all these arguments were over-ruled, and it was considered, that as the law stood at the time of Mr. Thelluson's decease, it was perfectly settled that the absolute vesting of property might be postponed, and the accumulation of it continued, during the lives of any number of persons in being, and for 21 years after the survivor's decease, and a further number of months, equal to the duration of pregnancy. And that as the term of suspence and accumulation, directed by Mr. Thelluson, was confined to the lives of persons in being at the time of his decease, or born in due time afterwards, or in ventre sa mere at his decease, and the life of the longest liver of them, without any reference to any further number of years, it not only did not exceed, but fell short of the boundary to which, according to the rules of law, it might have been extended. This was a plain executory devise, and every executory devise was good, which did not tend to make an estate unalienable beyond the time at which the remainder-man, who was not in existence at the time of the limitation of the estate, would arrive at the age of 21. And the Court had no other criterion to judge of the inconvenience, except by analogy to the restraint, which the common law imposes upon the alienation of real property; and as to the point respecting the legal existence of a child in ventre sa mere, it was considered as decided by the case of Long *v.* Blackall, 7 T. R. 100. The Judges were unanimous. But it has been considered by the legislature as expedient *in future* to restrain the power of accumulation, and therefore the statute of the 39 and 40 Geo. 3. c. 98, was passed, by which, as will be seen by referring to it in the appendix of statutes in this volume, the power of settling and devising property for the purpose of accumulation, is restrained to 21 years after the death of the grantor or testator. And no person can now by any deed or will, or by any other mode, settle or dispose of any *real* or *personal* property, so as that the rents, and profits or prodnce thereof shall be wholly or *partially* accumulated for a longer term than the life of the grantor or testator, or the

No. 20. limitations in this my will contained, be entitled in possession to my said mansion house, called ——— place, shall approve thereof, such approbation to be testified in writing; and shall and do convey, settle and assure, or cause to be conveyed, settled and assured, all and singular the hereditaments so to be purchased with their respective appurtenances, to and for such uses, intents and purposes, upon such trusts, and with, under, and subject to such powers, provisos, limitations, declarations and agreements, as are herein declared or expressed, of or concerning the hereditaments hereinbefore by me devised, and which shall from time to time be subsisting undetermined, and capable of taking effect. And I do hereby further declare my will to be, that the dividends, interest, and annual proceeds of the several funds and securities in or upon which the said several and respective trust-monies, and the trust-monies accruing thereupon, shall at

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term of 21 years after the death of the grantor, or testator, or the minority of any person who shall be living, or in ventre sa mere, at the death of the grantor or testator; and where any accumulation directed otherwise, such direction shall be void; and the rents, issues, profits and produce during the time that the same are directed to be accumulated, contrary to the said act, shall go to such person as would have been entitled thereto, if no such accumulation had been directed. But the act is restrained from applying to any provision for payment of debts, or for raising portions for children, or to any direction touching the produce of woods and timber.

Upon this statute, however, the Court of Chancery has held, that a trust by will for accumulation beyond the period thereby allowed, is void only for the excess; and therefore, where the accumulation was directed until the age of 21, of the legatee, not born at the testator's decease, it was determined to be good for 21 years; and it was said by the present Master of the Rolls, that if an accumulation was directed to continue for 24 years, it would be good for 21, within the determination in Griffiths *v.* Vere, decided by Lord Eldon. See Griffiths *v.* Vere, 9 Vez. Jun. 127, and Longdon *v.* Simpson, 12 Vez. Jun. 295.

Where a devise is made of the residue of the personal estate if the party shall attain 21, the profits in the mean time are construed to be given to the legatee, and are to accumulate. Trevanion *v.* Vivian, 2 Vez. 430.

the expiration of the said term of 21 years be invested, shall from the expiration of the said term of 21 years, go and be paid and payable to such person and persons, and in such course, order and manner, as the rents and profits of the several hereditaments hereinbefore by me devised, shall, by virtue of the limitations aforesaid, go, be made payable and applicable. No. 20.

No. 21.

Power given in a Will to a person to whom a life estate is limited, to charge the estate with portions for younger children, varying in amount with the number of children to be provided for.

PROVIDED always, and I do will and direct, that it shall and may be lawful to and for my said daughter Margaret, by any deed or deeds, instrument or instruments in writing, with or without power of revocation, to be by her sealed and delivered in the presence of, and attested by, two or more credible witnesses, or by her last will and testament in writing, or any codicil or codicils thereunto, to be signed and published by her in the presence of, and attested by, three or more credible witnesses, (but subject and without prejudice to the said annual sums or yearly rent charges hereinbefore limited by this my will, and the powers and remedies for recovering the same) to subject and charge all or any part of the said hereditaments and premises, hereinbefore limited in use to her for life, to and with the payment of any sum or sums of money for the portion or portions of all and every the child or children of the body of my said daughter, lawfully to be begotten, (other than and except, and not being an eldest or only son (1), entitled for the time being to

(1) Every child, except the heir, is considered in equity as coming within the description of younger children; thus the eldest daughter, where there is a son, or where the estate by a settlement goes Who in equity are younger children.

No. 21. the hereditaments and premises, or any part thereof, either in possession or in remainder, expectant on the decease of my said daughter, under the limitation contained in this my will,) not exceeding the amount hereinafter mentioned, that is to say, if there shall be no more than one such child, (other than and except as aforesaid,) not exceeding the sum of 5000*l.* for his or her portion; if there shall be two such children, and no more, (other than and except as aforesaid,) not exceeding 10,000*l.* for the portions of such two children; if there shall be three such children, (other than and except as aforesaid,) not exceeding 15,000*l.* for the portions of such three children; and if there shall be four or more such children (other than and except as aforesaid,) not exceeding 20,000*l.* for the portions of such four or more of them; with interest for such portion or portions; the same respectively to be paid to such child or children at such age, day or time, or ages, days or times, and if more than one in such parts, shares, and proportions, and subject to such conditions, restrictions, and limitations over, such limitations over to be for the benefit of some or one of such children, (other than and except as aforesaid,) as my said daughter Margaret shall deem prudent and expedient, and by any deed or deeds, instrument or instruments in writing, so to be sealed, delivered and attested as aforesaid, or by such last will and testament, codicil or codicils thereunto so to be signed, published and attested as aforesaid, shall direct, limit, or

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all to a remainder-man, is a younger child in equity, Beale *v.* Beale, 1 P. Wms. 244. And if a younger son becomes eldest, he is excluded, Lord Teynham *v.* Webb, 2 Vez. 198. Indeed, in Lady Lincoln's case, one, who was a younger son at the death of the testator, and the tenant for life, becoming eldest before 21, till which the portions were subject to survivorship, on the whole will was held not entitled, 10 Vez. Jun. 166.

Even an eldest son, not provided for, may be considered as a younger, of which see a curious instance in Duke *v.* Doidge, 2 Vez. 203, in the note. And where the descent is according to the custom of Borough English, without doubt, upon the same principle, the eldest son would be a younger to this purpose in equity.

appoint; but so, nevertheless, that if such children, so entitled to have or be provided with portions as aforesaid, shall be reduced to three, such three children shall not be entitled to have more than 15,000*l.* raised for their respective portions; and if such children shall be reduced to two, such two children shall not be entitled to have more than 10,000*l.* raised for their respective portions; and if such children shall be reduced to one, such one child shall not be entitled to have more than 5000*l.* raised for his or her portion. No. 21.

(Power to create a term of years for raising the said portions.)

No. 22.

Devise of an Advowson to Trustees to present a certain Person to the next Avoidance.

I GIVE and devise my advowson and right of patronage of and to the living of H., in the county of ——, to F. P., of, &c. and W. L., of, &c. and their heirs, to the use of the said F. P. and W. L., their heirs and assigns, in trust that they or the survivor of them, or the heirs or assigns of such survivor, shall and do present I. T. of, &c. to the next turn or avoidance thereof, and subject thereto, upon trust to convey the same to and for such uses, intents, and purposes, upon such trusts, and under and subject to such powers, provisos, limitations, and declarations, as in and by this will are limited, declared and expressed, of and

No. 22. concerning my other hereditaments and real estate in the county of, &c. or such of them as shall be subsisting and capable of taking effect.

No. 23.

Words of a Will whereby a Testator charges his Debts, Legacies, &c. upon all his Estate.

THIS is the last will and testament of me, M. H., of, &c. made this ——— day of ———, in the year ———. I charge all my real and personal estate, of what nature or kind soever, with the payment of all my debts, funeral expences and legacies, as well such as I shall hereby give, as such other legacies and annuities as I may hereafter give by any codicil or codicils to this my will (1).

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(1) By such words in a will duly executed, a testator enables himself to lay any number of additional legacies on the land by a subsequent testamentary disposition unexecuted. See Vol. I. ch. 1. s. 6. of this treatise.

To entitle a legatee to recover his legacy out of the real estate, there seems to be no necessity for proving the will in the Spiritual Court. 3 Atk. 361.

What words are necessary to charge the specific devisee with legacies.

It is to be observed that words importing clear intention to charge the realty are necessary to make the land in the hands of a specific devisee subject to legacies; therefore, if a clause, either at the beginning or end of a will, run thus, "First, I will and direct that all my debts, legacies and funeral expences shall be fully paid," these words will not give the legatee place of the *specific* devisee, though perhaps by such words the residuary real estate might be charged with the legacies. And perhaps also this would be considered as sufficient to charge even *specific* devisees in their order, (for the general devisee and the heir come first into contri-

No. 24.

Clause to prevent an Annuitant under the Will from parting with his Annuity.

AND my will further is, and I do hereby expressly declare and direct, that in case my said nephew, A. B., shall alien, sell, assign, incumber or transfer, or in any manner dispose of or anticipate the said annuity or yearly sum of 200*l.* or any part thereof, then and in such case, and from and immediately after such alienation, sale, assignment, or transfer, the said bequest so made thereof as aforesaid, and the use and estate so given to him therein, shall cease and be void, to all intents and purposes as if the same had not been mentioned in this my will, or as if the said C. K. were naturally dead.

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bution) with the *debts*. See Knightley *v.* Knightley, 2 Vez. Jun. 328. But the Lord Chancellor doubted of the distinction in this respect, in Williams *v.* Chitty, 3 Vez. Jun. 545. The Master of the Rolls, however, maintained the distinction, in Shallcross *v.* Finden, 3 Vez. Jun. 738. And see 3 P. Wms. 91. Harris *v.* Ingledew, ib. 358.

In this last case the words at the beginning were, "After payment of all my just debts, funeral expences;" and it was clearly held that the *debts* were charged by these words.

No. 25.

Devise of Copyholds and Leaseholds, for lives and years, to Trustees, to the same uses as the Freehold.

AND I give and bequeath all my customary, or copyhold (1) messuages, lands, and hereditaments, and also all my messuages, farms, lands, tenements, and hereditaments

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Of the necessity for the party's having the legal estate in him at the time of his surrendering his copyhold to the use of his will.

(1) The necessity for, and the operation of a surrender of a copyhold estate to the use of the will made, or to be made, has been considered. To what has been observed, it may be here added, that for the will to have its legal effect, it is necessary that the party, when he makes the surrender to the use of his will, should have the legal estate, Doe d. Ibbott, *v.* Cowling, 6 T. R. 63. otherwise the surrender to the use of the party's own will, can have no effect, any more than if the surrender were made to a stranger. Thus, where a copyhold was surrendered to J. S. on the 10th October, 1793, and the surrenderee afterwards, and before he was admitted, surrendered the same to the use of his will; and on the 17th June, 1795, and not before, the surrender was presented and the testator admitted; it was held that the surrender to the use of the will was inoperative, and that the admittance did not relate; for before the surrender to the testator was executed by the admission, the legal estate was wholly in the surrenderor, and the surrenderee could not enter without being a trespasser to the surrenderor, and the surrenderee could not have maintained ejectment unless he was admitted before the trial. And as to the question of *relation*, it was held that the admission could not *relate* so as to validate the surrender by J.S. to the use of his will, for though relation will in many cases help acts in law, it will not help the acts of the party, that is, it will not make void acts of parties good by the fiction of law. See the learned judgment pronounced by Lord Ellenborough, in the case of Doe on

whatsoever, which I hold by virtue of, or under any grant, No. 25.
lease, or demise, from the Crown, or any college in either of the Universities, or from any bishop, dean and chapter, or other person, body politic or corporate, ecclesiastical or civil, for any term of life or lives, or years determinable on deaths, or usually renewable at certain times and periods respectively, and also all my leasehold messuages, lands, and tenements, which I hold for any term or number of years (in case any such there be) unto the said ——— and ———, their heirs, executors, administrators and assigns respectively, according to the nature and quality of the same respectively, for and during all my estate and interest therein, upon trust that my said trustees, and the survivor of them, his heirs, executors, and administrators, shall and do settle and assure the same, so and in such manner as that the clear residue of the rents, issues, and profits of the same copyhold and leasehold premises respectively, may be received, taken, and enjoyed by and for the use and benefit of such person or persons as for the time being shall, by virtue of this my will, and the settlement to be made according to the directions hereinbefore contained, be entitled to any

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dem. Tofield v. Tofield, 11 East, 266. And for the doctrine of relation the reader is referred to the 8th section of chapter 2 of this treatise. The reader will observe, that in this case there was an original defect of estate and not of a surrender, so that this was not a case for equity to supply a surrender, which it would have done if the testator had had the legal estate, and had only omitted the surrender to the use of his will, as the wife was the devisee. But in another view of the equity of the case, it should seem there was a good ground of relief; since the first surrender was for valuable consideration, and gave the surrenderee an equitable interest, and it has always been the rule of equity, that where the party has the beneficial interest only in copyhold lands, he may devise them, and they will pass by his will as well as any other lands, without a surrender. See Tuffnell v. Page, 2 Atk. 37. King v. King, 3 P. Wms. 360. Macey v. Shurmer, 1 Atk. 390. Allen v. Poulton, 1 Vez. 121. Macnamara v. Jones, 1 Bro. C. C. 481. Daire v. Beversham, 4 Ch. Rep. 76.

No. 25. estate of freehold and inheritance, of and in my said manors, hereditaments, and premises in the said counties of —— and ——, and until some persons entitled to an estate of inheritance shall, by good assurances in the law, become seised of the said manor, hereditaments, and premises in fee simple, in possession; and immediately upon or after that event, the trustees in the said settlement of the said copyhold and leasehold premises, shall be thereby directed and required to surrender, assign, and assure the said copyhold and leasehold lands, tenements, and premises, with their and every of their appurtenances, and all estates, terms, and interests of my said trustees, of, and in the same, unto such person or persons so seised of, or entitled to the inheritance of the said manors, messuages, lands, and hereditaments aforesaid, by such deeds, writings, instruments, surrenders and assurances, as by such person respectively, or by his counsel learned in the law, shall be reasonably advised or required: and also upon trust that my said trustees, and the survivor of them, his heirs, executors, or administrators, in the mean time, and until such settlement shall be made, do and shall by and out of the rents and profits of the said leasehold premises, pay the rents and perform the covenants reserved by the original and subsisting leases, and also by and out of my personal estate renew the leases of the same premises, and take new leases thereof respectively, in their own names, when and as it shall be usual and requisite, and also from time to time make such proper surrenders of the leases subsisting, as shall be requisite, and necessary or incident to such renewals, and also do and shall, by and out of my said personal estate, or the rents and profits aforesaid, pay and discharge the fines and fees of admissions to, and surrenders of, my said copyhold lands.

No. 26.

Devise of the residue of Testator's personal estate, in trust, to sell, call in, dispose of, and convert into money, such part as shall not consist of stock, or real securities, and invest it in securities, and thereout make a marriage provision for a collateral relation.

AND as to all the rest, residue, and remainder of my personal estate, money in the public funds, and money out at interest, and securities for money, arrears of rent, goods, chattels and effects, of what nature or kind soever, not herein specifically bequeathed, I hereby give and bequeath the same, and every part thereof, unto the said ——— and ———, their executors, administrators and assigns, upon trust, that they, the said ——— and ———, and the survivor of them, and the executors or administrators of such survivor, shall and do, as soon as conveniently may be after my decease, receive, collect, call in, dispose of, and absolutely convert into ready money, so much and such part of the said residue of my personal estate to them bequeathed, as shall not, at the time of my decease, consist of stock in the public funds, or of government or real securities; and shall and do lay out and invest all such sum and sums of money, as shall arise by converting into ready money all such part of the said residue of my personal estate as aforesaid, either in the public funds, or on real or government securities, at interest, and shall and do stand and be possessed thereof, and also of all such part of the residue of my personal estate as shall at the time of my decease, consist of stock in the public funds, or of government or real securities respectively, and of the interest, dividends and annual produce thereof, upon the trusts, and subject to the directions and declarations hereinafter contained (that is to say,)

No. 26. upon trust, that my said trustees, or the survivor of them, and the executors, administrators or assigns of such survivor, shall and do, by and out of the same residue, raise ——*l.* of lawful money of Great Britain, and pay the same to the said ——, or to such person or persons as she shall, by any deed or writing, executed by her, in the presence of two or more credible witnesses, direct or appoint, immediately upon, or in certain prospect of her marriage, as and for her pecuniary fortune or marriage portion, and for which her receipt alone, notwithstanding her coverture, or that of her legal assignee, shall be an effectual discharge, so as an adequate and proper jointure and provision for her and her issue be settled and secured in consideration thereof. Provided that in case my said niece shall die without having been married, then the said sum of ——*l.* shall not be raised and paid at all, but shall sink into, and become a part of, the residue of my personal estate, for the benefit of the person or persons who shall become entitled thereto under this my will.

No. 27.

Bequest of Jewels, &c.

I ALSO give to my said wife the use of all my jewels and pearls, usually worn by herself, during her widowhood; and upon the marriage or decease of my said wife, which shall first happen, I give the same jewels and pearls to the said E. A., and G. C., their executors, administrators, and assigns, upon trust, that they permit and suffer them to be used and enjoyed by the person or persons, who, from time to time, shall, by virtue of the limitations to be contained in the settlement so to be made as aforesaid, be for the time being entitled to the immediate freehold of the estates to be therein comprised, but so as that the same

shall not vest in any child or children of any person or persons to be therein made a tenant or tenants for life, who, being a son or sons, shall not attain the age of 21 years, or being a daughter or daughters, shall not attain that age, or marry. Provided always, and I do hereby declare my will and mind to be, that it shall and may be lawful to and for my said son W., and after his decease, my son T., and my grandson L., when and as by virtue of any of the limitations to be contained in the settlement or settlements so to be made as aforesaid, they shall respectively be entitled to the immediate freehold of the hereditaments, in such settlement or settlements to be comprised, by any deed or deeds, instrument or instruments, to be by them respectively sealed and delivered, in the presence of, and attested by, two or more credible witnesses, or by their respective last wills and testaments, or any codicil or codicils thereto, to be by them respectively signed and published in the presence of, and attested by, the like number of witnesses, to direct or appoint, that any woman or women, whom they may respectively marry, shall have the use of all or any part of the said jewels or pearls, during her or their widowhood, or respective widowhoods; and my said trustees shall permit and suffer the same to be used and enjoyed by her or them accordingly. Provided always, and I do hereby direct the said E. A., and G. C., and the survivor of them, and the executors, administrators and assigns of such survivor, at the request of the person or persons, who, for the time being, shall be entitled to the use of the aforesaid jewels and pearls, by virtue of this my will, to have them, or any of them reset, so that their value shall not thereby be lessened, the expence of such resetting to be paid out of the fund hereinbefore directed to be established, or to exchange the same, or any of them, for others of equal or greater value (except with respect to my family pearl necklace, the ruby ring set with diamonds, the emerald ring set with diamonds, and the sapphire ring, with the figure of ——— engraved upon it, which I desire may be preserved in their present state). Provided, and I do hereby declare my will to be, that it shall and may be lawful to and for the said L. C. H., to have the

No. 27.

Power for the tenants for life as they come into possession to appoint the use of the jewels to their widows respectively for their lives.

Power for the trustees to have them reset.

No. 27. use of my pearl bracelets, with diamond clasps (1), during her life, unless she shall marry again; but that immediately upon her decease, or second marriage, which shall first happen, the same shall vest in the said E. A., and G. C., or the survivor of them, his executors or administrators, upon such trusts as hereinbefore declared or expressed of or concerning the jewels aforesaid.

No. 28.

Appointment under a power for the benefit of Testator's younger children.

AND whereas my surviving daughters have respectively attained the age of 21 years, but my younger son is still an infant, of the age of 15 years; now I, the said A. B., by force and virtue, and in exercise of the said power and authority, do by this my last will and testament in writing, signed and sealed by me, in the presence of, and attested by, the three credible persons whose names are intended to be hereunder written as witnesses to my signing, sealing, and publishing this my last will, direct and appoint the sum of ———*l.* residue of the said sum of ———*l.* or such other sum of money as shall be to be raised under

(1) If a testator bequeaths a certain thing, which he specifies as being his own, the legacy will not have its effect, unless that thing be found extant among the testator's property, as, if he bequeaths it by the words, 'my watch, my diamond ring,' &c.; but if he says, 'I bequeath a watch,' or, 'a diamond ring,' the legacy will have its effect, if the value and species are described so as to render it sufficiently certain: and this is the rule of the civil law; Domat. 2 V. 759, s. 21.

the trusts of the said term of 99 years, to be raised immediately after my decease, out of my said family estates, under the trusts of the said term, to be divided amongst my said three children, Mary Caroline, Elinor and Edward, and any other child or children whom I may hereafter have by the said ———, in the shares and manner hereinafter mentioned, (that is to say) to be paid and divided among all my said younger children, in equal shares and proportions; the respective shares of my said daughters ——— and ———, to become vested and payable upon my decease, and to carry interest from that time at the rate of ——— per cent per annum; and the share of my said son E. to be paid on his attaining the age of 21 years; and the share and shares of such child, or such of the children I may hereafter have by the said ———, as shall be a daughter or daughters, to be paid at her or their age, or respective ages of 21 years, or day or respective days of marriage, which shall first happen, and as shall be a son or sons, at the age of 21 years. And I do hereby direct and appoint, that the trustees or trustee for the time being of the said term of years, shall levy and raise, and pay to or for my said son E., and such child or children as I may hereafter have by the said ———, from the time of my decease till they respectively shall become entitled to receive their shares of the said sum of ———*l.*, or such other sum of money as aforesaid, for or towards his or her maintenance and education, any yearly sum not exceeding the yearly sum of 200*l.* a piece. And my will is, and I do hereby declare, direct, and appoint, that in case my said son E., or any such child or children as I may hereafter have by the said ———, shall die before his or her share, or their respective shares of the said principal money shall become payable, that then the share and shares of him, her or them, or any of them so dying, shall go to and be divided between my surviving children, if more than one, in equal shares and proportions, and if only one, then the whole shall go to such one surviving child, and shall be considered as part of the original portion or portions of such child or children. No. 28.

No. 29.

Clause in a Will, directing a Power of leasing and of selling and disposing, to be inserted in the Settlement directed to be made of the Testator's real Estates.

AND I do hereby declare my will to be, that in such settlement there shall be contained a power to enable the said E. A., and G. C., and the survivor of them, and the executors and administrators of such survivor, from time to time, during the continuance of the said term of 2000 years hereby limited and created, and after the determination thereof, for the person or persons, who for the time being shall, by virtue of the limitations in such settlement to be contained, be entitled to the said manors and hereditaments hereinbefore devised and comprised in the same term, for an estate of freehold, to grant, demise, limit, or appoint the said hereditaments, or any of them, or any part thereof, for any term or number of years, not exeeeding 21 years, at the most improved rent, without taking any fine, and under the usual restrictions: and also a power to enable the said E. A. and G. C., and the survivor of them, and the executors and administrators of such survivor, from time to time, and at any time or times hereafter, at the request, and by the direction, of the person or persons who, for the time being, shall be entitled to the hereditaments to be comprised in the settlement hereby directed to be made as aforesaid, for an estate of freehold, either in possession or in remainder, immediately expectant on the said term of 2000 years, signified by some writing, under the hand and seal, or hands and seals, of such person or persons, attested by two or more credible witnesses, to make sale of, or to convey in exchange for, or in lieu of other hereditaments, all or any of the hereditaments to be comprised in the settlement so to be made as aforesaid, and the fee simple and inheritance thereof, as well

as for the said term of 2000 years, due regard being had to the proviso next hereinafter contained or expressed, with the usual clauses, making the receipts of the said E. A. and G. C., or the survivor of them, or the executors or administrators of such survivor, effectual discharges to the purchaser or purchasers of the hereditaments which shall be so sold, and the usual directions to lay out the money to arise by such sale or sales, in the purchase of other freehold lands of inheritance, or of copyhold lands convenient to be held with the lands hereby devised, or any of them, or so to be purchased or taken in exchange, in pursuance of this my will, and to settle the lands so to be purchased, or so to be received in exchange as aforesaid, to the uses of the settlement hereinbefore directed to be made as aforesaid, or as near thereto as the nature of the tenure and circumstances will permit, any thing hereinbefore contained to the contrary thereof in any wise notwithstanding. No. 29.

No. 30.

Clause in a Will, by which the Testator, after limiting his real Estates to his Son for Life, Remainder in the strict Form to the Sons of such Son successively in Tail Male, limits the same to his two Daughters, in Moieties, with Survivorship, for Life, to take exclusively of their Husbands, with the same Remainders in Tail to their respective Children in succession, with cross ultimate Remainders; the whole being directory of a Settlement to be made.

AND for default of such issue, to the use of trustees and their heirs, during the lives of my said two daughters A. B. and C. D., and the life of the survivor of them, in trust, to

No. 30. pay the rents, issues, and profits thereof to such person or persons respectively, as they my said daughters respectively, and the survivor of them, by any writing or writings under their respective hands, or the hand of such survivor, shall from time to time, as the same respectively shall become due or payable, but not by way of anticipation, direct or appoint, so as that my said daughters, during their joint lives, shall not have the power of disposing of more than a moiety each, of the said rents, issues, and profits, and for want of such direction and appointment, into the proper hands of them respectively, in moieties, whilst both of them shall be living, and of the survivor of them, for their and her sole and separate use, exclusively and independently of any husband with whom they respectively may happen to intermarry, and not to be in anywise subject to the controul, debts, or engagements of their respective husbands: and my will is, that their respective receipts in writing, and the receipt of the survivor, or the receipt or receipts of the person or persons to whom they respectively, or the survivor of them, shall direct the said rents, issues and profits to be paid as aforesaid, shall be good and effectual releases and discharges for the rents, issues and profits therein mentioned to be received; and upon further trust, during the lives of my said daughters, and the life of the survivor of them, to preserve the contingent uses and estates to be limited as hereinafter mentioned, and from and after the decease of the survivor of them, my said daughters, as to one undivided moiety or equal half part or share of the same hereditaments, to the use of the first and other sons of my said daughter, A. B., successively, according to their respective seniorities, in tail male, and for default of such issue to the use of the first and other sons of my said daughter, C. D., successively, according to their respective seniorities in tail male; and as to the other undivided moiety, or equal half part or share of the same hereditaments, to the use of the first and other sons of my said daughter, C. D., successively, according to their respective seniorities, in tail male, and for default of such issue to the use of the first and other sons of my said daughter A. B., successively, according to their respective seniorities, in tail male; and from and after the decease of both

my said daughters, and failure of issue male of both their bodies as aforesaid, then, as to the entirety of the same hereditaments, to the use of ———, his heirs and assigns. No. 30.

No. 31.

Devise of a Sum to be applied in releasing poor Prisoners.

I will and direct that my executors shall, within ——— months after my decease, lay out and expend the sum of *1000l.* in releasing and discharging such poor prisoners who shall be imprisoned at my decease in ——— prisons, or one of them, for debt, as my executors shall think fit, having regard, in the application of the said sum for this purpose given, to such poor prisoners as shall be then in prison, whose conduct has been virtuous and industrious, whose families are in want, and whose confinement has been owing to losses and misfortunes, and not to idleness, drunkenness or debauchery (1).

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(1) If the testator is desirous of making this legacy cease in case of his giving the said sum, or to cease as to a proportionate part, in case of his giving any less sum, in his life-time, it will be better for him to reserve this to be directed by a codicil, which may determine the quantum, and ascertain the fact, by a statement upon the face of it, and thus the executors will be relieved from a troublesome enquiry, during which it might be necessary to suspend the execution of the testator's bounty.

No. 32.

A Preamble to a Will, the Testator being about to go to Sea.

IN the name of God, Amen. I, C. D., of ——, mariner, being in good health, and of sound mind, and being about to depart this kingdom, on a voyage to ———, in the kingdom of ———, and having regard to the dangers of the seas, and the uncertainty of life, do, in case I die before I return to Great Britain (1), make this my last will and testament, as follows, that is to say, &c.

No. 33.

A general Form of a Codicil to a Will, where only some few additional Legacies are given.

WHEREAS I, A. B., of ——, have made, and duly executed my last will and testament, in writing, bearing date, &c. Now I do hereby declare this present writing to be as a codicil to my said will, and direct the same to be annexed thereto, and taken as part thereof; and I do hereby give, bequeath, &c. In witness whereof, I, the said A. B., have to this codicil set my hand and seal, this ——— day of ———.

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(1) See the case of Parsons *v.* Lanoe, Ambl. 557. This will is avoided by his return.

No. 34.

Another general Form of a Codicil to a Will, where several Legacies are revoked.

WHEREAS I, A. B., of ——, &c. have by my last will and testament, in writing, duly executed, bearing date, &c. given and bequeathed to, &c. Now I, the said A. B., being desirous of altering my said will in respect to the said legacies, do therefore make this present writing, which I will and direct to be annexed as a codicil to my said will, and taken as part thereof; and I do hereby revoke the said legacies by my said will given to ——, and I do give to each of them the said —— and —— the sum of ——*l.* only (1); and I give unto, &c. And I do ratify and confirm (2) my said will in every thing, except where the same is hereby revoked and altered as aforesaid.

In witness, &c.

No. 35.

A Codicil executing a Power given by a Settlement.

A CODICIL to be added to, and to be taken as part of the last will and testament of me M. B., of N. and W., in

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(1) Substituted legacies stand charged upon the same fund as the original legacies.

(2) All codicils are part of the will: therefore a codicil merely for a particular purpose, *and confirming the will in other respects*, does not revive any part of the will which had been revoked by a former codicil; Crosbie *v.* Macdowall, 4 Vez. Jun. 610.

No. 35. the county of L. Whereas by indenture of lease and release, bearing date respectively the —— and —— days of June, in the year of our Lord 1721, and made or mentioned to be made between me the said M. B. of N. and W., by the name of ——, of the one part, and M. K. of A., in the county of Cornwall, Esquire, and T. R., of the Middle Temple, Esquire, of the other part, I, the said M. B. of N. and W. for the settling of the manors, lands, tenements and hereditaments therein mentioned, and in consideration of 10*s.* of lawful money, did bargain, sell, alien, release and confirm unto the said M. K. and T. R., the manors, advowsons, messuages, lands, tenements and hereditaments therein contained, and amongst others, all that the manor, or reputed manor of L., with the rights, members, and appurtenances thereof, in the county of B., and the messuages, lands, tenements and hereditaments of me the said M. B., of N. and W., in L. and F. aforesaid, or either of them, in the said county of B., to hold to the said M. K. and T. R., their heirs and assigns for ever, to and for the uses, intents and purposes, and subject to the powers, limitations and provisos thereinafter expressed and contained, of and concerning the same; in which said indenture of release is contained a proviso, that it should and might be lawful to and for me the said M. B. of N. and W., from time to time, and at any time or times, during my life, by any deed or writing, to be sealed and delivered, or by my last will or testament to be signed by me in the presence of two or more credible witnesses, to revoke or alter all or any of the uses or trusts thereby limited or appointed, or to limit any other or new estate, uses, trusts or dispositions, of or concerning the premises or any part thereof: and whereas by indenture, bearing date the fourteenth day of October, in the year of our Lord ————, and made, or mentioned to be made between me the said M. B. of N. and W. of the one part, and T. B. of S., in the county of E. Esquire, J. L. of the parish of St. J. within the liberty of the city of W., in the county of M., Esq., and E. R., of the parish of St. ——, in the said county of M., Esq., of the other part, reciting the said hereinbefore recited indenture, and also reciting two several other indentures made subsequent thereto, whereby the uses of and concerning the said premises, in and by the

said first-mentioned indenture limited and declared, were altered and revoked of and concerning the said premises, but subject to a like proviso for altering and revoking the same, and appointing new uses as in the said first recited indenture contained; I the said M. B., of N. and W., in pursuance of the said power to me reserved, did revoke the uses in and by the said several recited indentures declared of and concerning the said premises, and did limit, appoint and declare the same premises, to and for the uses and trusts, and under the provisos thereinafter expressed concerning the same; in which indenture is also contained a proviso, that it should and might be lawful to and for me the said M. B., of N. and W., from time to time, and at all times thereafter, during my life, by any deed or deeds to be by me executed in the presence of two or more credible witnesses, or by my last will in writing, or codicil thereto, to be by me signed in the presence of two or more credible witnesses, to revoke or alter all or any of the uses, estates and trusts thereinbefore limited or declared, of or in all or any of the premises, and to limit any new or other estates, uses, trusts or dispositions of or concerning the same, so revoked, or any part thereof: and whereas I have made and published a will in writing, bearing date the same 14th day of October, now I the said M. B., of N. and W., in pursuance and by virtue of the said power to me reserved and given, in and by the said last-recited indenture of the 14th of October, in the year ——, and all and every other power and powers, authority and authorities to me given or reserved, or me in anywise enabling in this behalf, do by this my codicil revoke, annul and make void all and every the uses, trusts, estates, limitations and appointments in and by the said several recited indentures, or any of them, limited, created, or declared, of and concerning all that the said manor or reputed manor of L., with the rights, members, and appurtenances thereof, in the said county of B., and all the said messuages, lands, tenements and hereditaments of the said M. B., of N. and W., in L. and F. aforesaid, or either of them, in the said county of B., in and by the said first-recited indenture of release, granted, released, or conveyed, with their and every of their appurtenances; No. 35.

No. 35. and I the said M. B. of N. and W., in pursuance of and by virtue of all and every the power, &c. aforesaid, do direct, limit, appoint and declare, that the said first-recited indenture of release, and the grant and conveyance thereby made as to all that the said manor or reputed manor of L., with the rights, members and appurtenances thereof, in the said county of B., and all the said messuages, lands, tenements, and hereditaments of me the said M. B. of N. and W., in L. and F. aforesaid, or either of them, in the said county of B., in and by the said first-recited indenture of release granted, released, or conveyed, with their and every of their appurtenances, be and enure, and I do hereby give and devise the same in manner following, that is to say, To the use of the Honourable H. B. Esq., commonly called Lord H. B., brother of His Grace the Duke of ——, for the term of his natural life, without impeachment of, or for any manner of waste; and from and after the determination of that estate by forfeiture, or otherwise in his lifetime, then to the use of the said T. B., I. L. and E. R., and their heirs, during the natural life of the said H. B., in trust, to preserve the contingent remainders hereinafter limited from being defeated and destroyed, and for that purpose to make entries or bring actions, as the case shall require; but, nevertheless, to permit and suffer the said H. B., during his natural life, to receive and take the rents and profits of the same premises to his own use; and from and after the decease of the said H. B., to the use of M. the wife of the said H. B., for the term of her natural life, without impeachment of or for any manner of waste; and from and after the determination of that estate by forfeiture or otherwise, during her life, to the use of the said T. B., I. L. and E. R., and their heirs, during the natural life of the said M., in trust to preserve the contingent remainders hereinafter limited, from being defeated and destroyed, and for that purpose to make entries or bring actions, as the case shall require; but nevertheless to permit and suffer the said M. during her life, to receive and take the rents, issues and profits of the said premises, to her own use: and from and after the decease of the said M., to the use of the first son of the body of the said M., by the said H. B., begotten or

to be begotten, and the heirs male of the body of such first son, lawfully issuing; and for default of such issue, to the use of the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, and all and every the other son and sons of the body of the said M., by the said H. B. begotten or to be begotten, severally and successively, one after another, as they shall be in seniority of age and priority of birth, and the heirs male of their respective bodies lawfully issuing; the elder of such sons and the heirs male of his body, being always preferred, and to take before the younger of such sons, and the heirs male of his and their body and bodies; and for default of such issue male, to the use of all and every the daughter or daughters of the body of the said M., by the said H. B. begotten or to be begotten, as tenants in common, and not as joint tenants, and the heirs of their several and respective bodies lawfully issuing; and failing issue of any of the said daughters, to the use of all and every other such daughter or daughters as tenants in common, and not as joint-tenants, and the heirs of the respective body or bodies of such other daughter or daughters lawfully issuing; and for default of such issue, to the use of such person or persons, and for such estate or estates, and in such proportions and in such manner as she the said M., whether covert or sole, shall, by any deed or writing, to be by her sealed and delivered in the presence of three or more credible witnesses, or by her last will in writing, or any writing purporting to be her last will, and to be by her signed and published in the presence of a like number of witnesses, limit and appoint; and in default of such appointment, then to the use of my own right heirs for ever: provided always, and my will and meaning is, that it shall and may be lawful to and for the said H. B., and after his decease to and for the said M. his wife, in case she shall survive him, by indenture to make any lease or leases of the premises, for any term or number of years, not exceeding twenty-one years from the making thereof, so as upon every such lease or leases there be reserved and made payable, during the continuance of the said respective terms thereby granted, the greatest improved yearly rent that can or may be reasonably had for the same, to be incident to and go No. 35.

No. 35. along with the remainder or reversion expectant on such leases respectively, and so as such leases be not by any express words therein contained, freed from impeachment of waste; and so also as there be contained in every such lease or leases a power of re-entry, in case the rent or rents thereupon to be respectively reserved, or any part thereof, shall be behind or unpaid by the space of twenty-one days next after any of the times of payment therein to be respectively limited; and so as the respective lessee or lessees therein named, do execute a counterpart of such lease or leases respectively; and I do hereby ratify and confirm all and every the uses, trusts, estates, limitations and appointments in and by the said recited indenture of the 14th of October, ——, limited, appointed or declared, of or concerning all and every or any of the manors, messuages, lands, tenements and hereditaments therein comprised, except and other than the said manor of L., with its appurtenances, and the lands, tenements, and hereditaments aforesaid, in L. and F. aforesaid, or either of them, in the county of B., and I do also hereby declare, that my said will in writing, bearing date the 14th day of October, ——, and this codicil, which I will shall be added to and deemed part thereof, do contain my last will and testament. In witness whereof I have to this codicil, and to a duplicate thereof, both of the same tenor and effect, each contained in two skins of parchment, set my hand and seal, this —— day of, &c.

No. 36.

A nuncupative Will committed to writing.

T. B., his will by word of mouth, made and declared by him on the ——— day of ———, in the presence of us, who have hereunto subscribed our names as witnesses hereto. My will is that, &c.

(The very words)

I. G.
R. S.
F. G.

No. 37.

Conclusion and Attestation of a Will, written on several sheets.

I DO hereby make, ordain, constitute and appoint A. B. and C. D., executors of this my last will and testament, hereby revoking all former wills by me at any time heretofore made, and do declare this to be my last will and testament. In witness whereof I, the said T. S., have to this my last will and testament, contained in this and the four preceding sheets (or skins of parchment), set my hand and seal, (to wit) my hand to the bottom of each of the said four sheets (or skins,) and my hand and seal to this last sheet (or skin,) and my seal at the top of the said sheets (or skins) where all the said sheets or skins are fixed together, this —— day of ——, 1755.

The writing contained in this and the four preceding sheets (or skins) was signed

No. 37.

and sealed by the above-named T. S., and by him published and declared as and for his last will and testament in the presence of us, who have hereunto subscribed our names in his presence, and in the presence of each other,

N. S.
T. B.
F. L.

No. 38.

Common Form of Attestation.

SIGNED, sealed, published and declared by the above-named J. S., as and for his last will and testament, in the presence of us, who have hereunto subscribed our names as witnesses thereto, in the presence of the said testator, and in the presence of each other.

C. D.
E. F.
G. H.

No. 39.

Attestation of a Codicil.

SIGNED, sealed, and published by the said M. B., of N., as and for a codicil to be added to and be considered as part of her last will and testament, in the presence of us, who have subscribed our names in her presence.

R. S.
F. B.
R. T.

III. SUPPLEMENTARY MATTERS AND CASES

IN ELUCIDATION OF

SOME OF THE SUBJECTS TREATED OF

IN THESE VOLUMES.

THELLUSSON *v.* WOODFORD, WOODFORD *v.* THELLUSSON.

13 Vezey Jun. 209.

Election in Equity.

Vol. I. Chap. I. Sect. 10. The subject of election is considered in the part of this treatise here referred to, only in reference to the question, whether an unexecuted will is of force to raise a case of election against a person claiming in contradiction to the will, but taking a benefit in the personal estate under the same will. The case of Thellusson *v.* Woodford involves so clear an exposition of the general doctrine, that I have been induced to give it a place here.

Will, directing, that, in case the testator

"The will of Peter Thellusson, dated April 2, 1796, devising all his estates, manors, &c. at Brodsworth, and other places in the county of York, and all the messuages or tenements,

shall enter into contracts for the purchase of lands, and die before the conveyance, such contracts shall be carried into execution, and the money paid out of his personal estate, and the conveyance be to his trustees, their heirs, &c. to the uses of his will. The heir at law, having interests bequeathed to him, put to election.

lands, hereditaments or premises, for the purchase whereof he had entered into any contract, or contracts in writing, with the benefit of such contract and contracts respectively, and all other his real estates, whatsoever and wheresoever, to the use of trustees, their heirs and assigns, upon the trusts after-mentioned, contained in the following clause:

"'In case I shall in my life-time enter into any contracts for the purchase of any lands, tenements or hereditaments, and I shall happen to die before the necessary conveyances thereof are executed, I order and direct, that all and every such contract or contracts, so entered into by me as aforesaid, shall be completed and carried into execution by my said trustees after my death, and that the purchase-monies for such respective estates and premises shall be paid by them, by, with, and out of my personal estate and effects, and that the deeds and conveyances thereto respectively shall be made to them, their heirs and assigns; and that they and every of them shall stand, remain, and be seised and possessed of all and singular the premises so to be conveyed upon, under, and subject to such and the same uses, trusts, limitations, provisos and conditions, as are in and by this my will created, expressed and declared, of and concerning the estates hereby directed to be purchased by and with the aforesaid residuum of my estate and effects in the manner hereinbefore mentioned.'

"The testator within a month before his death, had contracted for the purchase of real estates to the amount of 30,000*l*.

"The bill filed by the trustees, prayed, that the trusts of the will may be established; and that it may be declared, whether Peter Isaac Thellusson, as heir at law of the testator, is or is not entitled to such parts or particulars of his real estate, as were conveyed to him after making his will; and also to such particulars of his real estates as were purchased, contracted, or agreed to be purchased by the testator, after making his will; and to have such of the said contracts as remained unperformed at his decease, completed for the benefit of his said heir at law, and to have the purchase-money paid out of the personal estate of the testator; and particularly, that it may be declared, whether the heir is en-

titled to such last-mentioned real estates, and also to the legacies and bequests in the will: and, if not, then that he may be put to his election.

"The decree, dismissing the bill filed by the widow and children of the testator, as far as it ought to have the trusts of the will declared void, and establishing the will, giving directions for carrying the trusts into execution, and declaring a trust, as to the estates, contracted for by the testator, after the date of his will, for the heir, reserving the question, whether he would be entitled to the personal bequests, having been affirmed by the house of Lords upon appeal, the question of election was brought forward upon the petition of the trustees.

THE LORD CHANCELLOR,

"The prayer of the bill, filed by the heir at law, with reference to this point, is in effect, that the personal estate of the testator shall be applied to the completion of these contracts, directed by the will to be carried into execution, for the benefit of the heir; and that he, in opposition to the will, may take as heir those estates so contracted for; and the trustees may stand seised to his use, instead of the uses of the will. I give the judgment, which I find myself bound to give, with some reluctance; considering this will as dictated by feelings, not altogether consistent with convenience. But this appears to me to be a case of election. The jurisdiction exercised by this court, compelling election, may be thus described. A person shall not claim an interest under an instrument without giving full effect to that instrument, as far as he can. If therefore a testator, intending to dispose of his property, and making all his arrangements under the impression, that he has the power to dispose of all, that is the subject of his will, mixes in his disposition property, that belongs to another person, or property as to which another person has a right to defeat his disposition, giving to that person an interest by his will, that person shall not be permitted to defeat the disposition, where it is in his power, and yet take under the will. The reason is the implied condition, that he shall not take both; and the conse-

A person shall not claim an interest under an instrument without giving full effect to it, as far as he can; renouncing any right or property, which would defeat the disposition.

quence follows, that there must be an election; for though the mistake of the testator cannot affect the property of another person, yet that person shall not take the testator's property unless in the manner intended by the testator.

"This is the proposition. But it has been said, that when a testator by his will attempts to give that, which is not his property, but which he supposes to be his, forming his different dispositions upon that mistake, non constat, what he would have done, had he been aware of the true state of the circumstances. The best answer to that was given by Lord Alvanley, in the case of Whistler *v.* Webster [*]; that no man shall claim any benefit under a will without conforming, as far as he is able, and giving effect to every thing contained in it, whereby any disposition is made, shewing an intention that such a thing shall take place; without reference to the circumstance, whether the testator had any knowledge of the extent of his power or not; nothing can be more dangerous than to speculate upon what he would have, if he had known one thing or another: it is enough to say, he had such intention; and the court will not speculate upon what he would have done in the different cases put: if the instrument is such as to indicate what the intention was, the only question is, did he intend the property to go in such a manner: not, whether he had power to do so, and would have done it, had he known, he could not without a condition impose upon another person: whether he thought he had the right, or, knowing the extent of his authority, intended by an arbitrary execution of power to exceed it, no person, taking under the will, shall disappoint it.

"In every case of election there must be an intention to dispose of that, over which that person has no power of disposition. That is the circumstance that creates election. The testator, with this peculiar object, the application of his personal estate to the acquisition of great landed property, was not aware of the distinction between real and personal estate; and therefore conceived, that under this direction of his will as to his future contracts for purchases, his trustees

[*] 2 Vez. Jun. 367.

would be legally seised according to the uses of his will. As he had not the power to make that disposition, the heir takes those estates that cannot pass by the will: but the testator not being aware of that, gives considerabie interests to his heir; but gives those interests under the conception that the whole property and arrangement were subject to his controul; and upon that ground the principle of election must prevail.

"In Noys *v.* Mordaunt[b], the testator imagined he had power over the estate; which was in settlement; and the Lord Keeper put the decision upon the implied condition. That case was followed by Streatfield *v.* Streatfield[c], and several cases, down to Sheddon *v.* Goodrich[d]. The difficulty upon a plain, simple principle first occurred in the case of Hearle *v.* Greenbank[e]: but I do not apprehend that this case will be embarrassed by that decision. Lord Hardwicke held that the act of the infant had no effect; that there was no disposition as to the real estate; and therefore a case of election did not arise.

"This is the case of a man having a clear right to dispose by will both of his real and personal estate: but his disposition fails as to these real estates by his ignorance of the distinction that a will of a subsequent date was necessary. There is, therefore, as in the case of Hearle *v.* Greenbank[f], no will that can touch these real estates. As to the case of a devise, with two witnesses only, the intention is as plain as in Noys *v.* Mordaunt[g]: why then should not the court say in the former case, the intention is clear; but cannot as to the real estate have legal effect, from the omission of a third witness by mistake; as in the other case the devisor attempts through mistake, to devise an estate which is in settlement, or belongs to another person. The opinion of Lord Hardwicke I take to be this. A devise of real estate is considered as a matter of so much solemnity and importance, that the law will not accept proof of the act, without the evidence of three witnesses. If not so proved,

The only instances of limiting the principle of election, are 1st, an attempt to devise by a will not duly executed: 2dly, an attempt to devise by an infant.

[b] 2 Vern. 581.
[c] For. 176.
[d] 8 Vez. Jun. 481.
[e] 1 Vez. 298. 1 Atk. 695.
[f] 1 Vez. 298. 3 Atk. 695.
[g] 2 Vern. 581.

it is nothing: it cannot receive notice. The intention cannot be represented; for it cannot be presumed, and there is no evidence; the will not being executed with the solemnity prescribed by the law as to real estate cannot be read: the court cannot see any devise of real estate: and therefore, as the estate does not appear to be devised away from the heir, no act appearing to be done, as in this case the act does appear to be done by Mr. Thellusson, the heir cannot in that case be put to election.

"The case of Hearle *v.* Greenbank[h] stands upon the same ground: an infant under the statute[i] not having a right to dispose of real estate. The court cannot look at the will. It is, from the incapacity of the person who frames it, considered as no instrument.

"These are the only instances in which the principle has been limited. It cannot be argued that it does not reach an heir at law. Lord Hardwicke would not put the case of an heir at law by way of illustration, if the heir could not, under any circumstances, be put to election (1). The principle of election is plain and intelligible; that, if a person being about to dispose of his own property, includes in his disposition, either from mistake or not, property of another, an implication arises, that the benefit under that will shall be

[h] 1 Vez. 298. 3 Atk. 695.
[i] Stat. 32 Hen. 8. c. 1. 34 Hen. 8. c. 5.

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(1) "The case of a devise to the heir of an estate, which he would have by descent, if no will was made, and to another person, of an estate, of which the heir is seised in his own right, is put by Sir Samuel Romilly, (ante, Vol. IX. 374. Rich *v.* Cockell,) as said to be a case of election. Mr. Sugden (Law of Vendors and Purchasers of Estates, edit. 2. 128, 9. note 3.) has found a precise decision of the point accordingly, against the heir: Anon. Gilb. Eq. Rep. 15. In that instance it may be observed, the heir took, not under the devise, but by his better title, descent. The devisor, however, devising the estate to him, must be conceived to be aware of his power to devise it away; and the condition was accordingly implied." Note by the Reporter.

taken upon the terms of giving effect to the whole disposition. Mr. Thellusson's heir takes these estates, as if his father had not made a will: but my opinion is, that he cannot also take what is given to him by the will. He must therefore elect."

While we are upon this subject the Reader may be reminded, that the mere recital of an erroneous conception of right, is no devise by implication, so as to raise a case of election, as against the person having the right, and also taking a benefit by the will; but it seems the testator must, by positive attempt to dispose, make his intention clear[a].

SLATTER *v.* NORTON.

16 Vezey Jun. 197.

What Words are necessary to pass Leases renewed after the making of a Will.

Vol. I. p. 211. THE Reader will find that in the abovementioned case, the present Master of the Rolls, Sir William Grant, holds with Sir John Strange in Rudstone *v.* Anderson, that the words, "all my lease, &c." and "all my estate or interest in my lease, &c." are only commensurate phrases, and that the future words adverted to by Lord Hardwicke, in Abney *v.* Milner, as "all my interest *to come*, &c." are necessary to pass the interest acquired by the renewal of a lease after a will made.

[a] Dashwood *v.* Peyton, 18 Vez. Jun. 27.

SHEATH *v.* YORK.

1 Vezey and Beames, 390.

Revocation by Marriage and the birth of Children.

Vol. I. p. 347. IN the above case a restriction was adopted, in regard to devises of real estate, as to the question of revocation by a second marriage, and the birth of a child or children, where, at the death of the testator, children by the first marriage are in existence, which introduces a new and important feature into the doctrine treated of in the 17th section of the 1st chapter of Vol. I. of this treatise. The case is as follows:

Testator, a widower, having a son and two daughters, by will gave all his real and personal estates in trust, subject to debts, for those children, and in case of their deaths over. Marriage and the birth of a daughter, held a revocation of the will in the Ecclesiastical Court, (against a former decision) not a revocation of the devise of the real estate.

"Henry Clarke by his will gave to trustees all his real and personal estate upon trust to sell; and after payment of all his debts, &c. to place out the residue of the monies, arising from such sale on government or other security, and pay the interest, &c. towards the maintenance and education of his son John, and daughters Mary and Elizabeth, until they should attain twenty-one, and then to pay the principal equally unto and amongst his said children: but in case all his said children should die under age and without leaving issue, then upon trust to pay the residue unto his cousins, Peregrine Clarke, Henry Clarke, and Mary, the wife of Joseph Fowdrell: and he appointed his trustees executors and guardians of his children.

"At the time of making his will the testator was a widower, having the three children only, named in his will. He afterwards married a second wife, by whom he had issue one daughter. He died in November, 1810; and his son John Clarke died an infant, in September, 1811.

"A suit having been instituted in the Prerogative Court of Canterbury, that Court decreed, that the will was revoked by the subsequent marriage and birth of the child. A bill was then filed by some of the simple-contract creditors of the testator, against the executors and trustees of the testa-

tor, his two daughters by the first marriage, and those in remainder, &c. praying an account, payment, and sale.

THE MASTER OF THE ROLLS.

"Long after it had been settled by decisions of the Ecclesiastical Court, with the concurrence of Common Law Judges, sitting in the Court of Delegates, that marriage and the birth of a child would amount to a revocation of a will of personal property, it remained a doubt, whether such an alteration of circumstances would have the same effect with regard to a will of real estate: but it is now settled, that even a devise of land may be revoked by what Lord Kenyon, in the case of Doe on the demise of Lancashire *v.* Lancashire[a], calls 'a total change in the situation of testator's family.' What shall be deemed such a total change, may be matter of controversy in each new case: but all the cases, in which, hitherto, wills of land have been set aside upon this doctrine, have been very simple in their circumstances; and such as, when the doctrine was once received, could admit of no doubt with respect to its application. In all of them the will has been that of a person, who, having no children at the time of making it, has afterwards married, and had an heir born to him. The effect has been to let in such after-born heir, to take an estate, disposed of by a will, made before his birth. The condition, implied in those cases, was, that the testator, when he made his will in favour of a stranger, or more remote relation, intended, that it should not operate, if he should have an heir of his own body.

Marriage and birth of a child an implied revocation of a will of personal property. Even a devise of land may be revoked by implication from a total change in the situation of the family, as, where the devisor has no children at the date of the will, by his marriage and the birth of an heir; upon an implied condition, that the will should not operate in that event.

"In this case there is no room for the operation of such a condition; as this testator had children at the date of the will; of whom one was his heir apparent; who was alive at the time of the second marriage, of the birth of the children by that marriage, and of the testator's death. Upon no rational principle, therefore, can this testator be supposed to have intended to revoke his will on account of the birth of other children; those children not deriving any benefit whatsoever from the revocation; which would have operated

[a] 5 Term Rep. 58.

only to let in the eldest son to the whole of that estate which he had by the will divided between that eldest son and the other children of the first marriage.

"It is true, the Ecclesiastical Court has decided, that the will was revoked as to the personal estate: that is, in opposition to their decision in Thompson *v.* Sheppard, in 1779; where, under circumstances precisely the same, the will was held not revoked even as to the personal estate. There was in that case an appeal to the Delegates, but it was not prosecuted. The revocation however, as to the personal estate, had an effect, which might, perhaps, have been intended by the testator: that of letting in the after-born children with those of the first marriage: but the principle of the decision has no bearing whatsoever upon the devise of the real estate; which, according to my opinion, stands unrevoked."



DOE, ex. dem. CALKIN, *v.* TOMKINSON AND OTHERS.

2 Maule and Selwyn, 165.

What contingent Estates are devisable, and of the effect of the word 'survivor,' added to words creating a tenancy in common.

Devise of all his real and personal estate whereso-ever and whatso-ever, equally to his sisters M. and E., or

"EJECTMENT brought on the joint demise of S. Calkin and Jane his wife, J. M'Cormac and Anne his wife, and J. Cartlich and Sarah his wife, for a messuage and land in the parish of Dilhorn, in the county of Stafford. Plea, not guilty. At the trial at the Stafford Lent assizes, 1813, a verdict was found for the plaintiff, subject to the opinion of the court, on the following case:

"On the 7th of September, 1802, John Tomkinson being seised in fee of the premises in question, by his will, after directing his debts and funeral expences to be paid, devised thus: 'My will and desire is, that all my real and personal estate wheresoever and whatsoever, be left equally to my sisters, Mary and Elizabeth Tomkinson, of Forsbrooke, or to the survivor of them, and to be disposed of by the survivor, as she may by will devise,' and made his said sisters his executrixes. The testator died in 1810, leaving the said Mary and Elizabeth (who thereupon took possession of the estate) and also another sister, Anne, him surviving. Afterwards, on the 9th of July, 1810, Mary made her will, and thereby devised all her messuages, lands, tenements, hereditaments, and real estates whatsoever, situate at Forsbrooke, or elsewhere in the county of Stafford, to her sisters Elizabeth and Anne, successively for life, and from and after the decease of the survivor of them, she devised all such part of her real estate which was devised to her by the will of her late brother J. Tomkinson, to the defendants, their heirs and assigns, as tenants in common, and not as joint tenants. Elizabeth Tomkinson was living at the time when Mary made this will. Mary survived both E. and A. Tomkinson, but died without having re-published her will. The lessors of the plaintiff, Jane, Anne, and Sarah, are the heirs at law of Mary, and also of John, Elizabeth, and Anne Tomkinson.

to the survivor of them, and to be disposed of by the survivor as she may by will devise: held that the sisters did not take as tenants in common in fee; nor, supposing them to be tenants in common for life with a contingent remainder in fee to the survivor, or with a power to the survivor to dispose of the fee by will, was it such a contingent remainder as was devisable by a will made by one in the lifetime of both the sisters, nor was the power well executed by such will.

"The question for the opinion of the court is, whether the plaintiff is entitled to recover; if the court shall be of opinion that he is entitled, the verdict is to stand; if not, a nonsuit is to be entered.

"Lord Ellenborough C. J. It may be somewhat difficult, upon a will framed like this, to say what the estate given by it is; but, it is not equally so, to say what it is not. If it be not a tenancy in common in fee, it is clear that the defendants are not entitled to any part, under the will of M. Tomkinson. Now, to put this construction on the will of J. Tomkinson, would defeat the intention of the testator, because his intention was to give the whole to the

survivor. But then it is said, that this is a contingent remainder to the survivor, and such as is devisable; but supposing it to be a contingent remainder, I think it cannot be considered as devisable, because the person who is to take, is not in any degree ascertainable before the contingency happens; it cannot be said in whom the interest is, during the lives of the two sisters, nor consequently that it is in either of them during that period; and it is only in the event of survivorship that it becomes certain. Admitting therefore, the enlarged construction put on the statute of wills by Lord Kenyon and the other Judges in Roe *v.* Jones, how can a person be said to have a contingent interest, when it is uncertain whether he is the person who will be entitled to have it or not. And as to the case cited from Viner, to shew, that if this be a power to the survivor, it has been well executed, the distinction between that case and the present is, that there the power was given to a designated person to be executed upon a contingency; here it is given to a contingent person. Therefore, without determining what the precise estate given is, it appears to me sufficient to say that the defendants are not entitled.

" Le Blanc J. The defendants must support their case by shewing that this was a tenancy in common in fee, or such a contingent interest as was devisable by M. Tomkinson. On reading the words of the will, I think it is impossible to say that it is the first, without rejecting material words. The words are, 'that all my real and personal estate be left equally to my sisters, Mary and Elizabeth, or to the survivor, and to be disposed of by the survivor as she may by will devise.' In order to construe this to be a tenancy in common, it would be necessary to strike out the words, 'to the survivor, and to be disposed of by the survivor,' which are inconsistent with a tenancy in common, and thus to take away from the survivor the power of disposing of it. But as it is impossible to reject such material words, so we cannot intend that the devisor meant to give a tenancy in common in fee. Upon a will framed like this, I should perhaps feel great difficulties in determining what

precise estate was given, but I think it is quite clear, that we cannot put that construction on it which would reject material words.

"DAMPIER J. In Selwyn *v.* Selwyn, the person who was to take was apparent; there was, therefore, persona designata; and so it is evident Lord Mansfield considered, from what he said of that case in Roe *v.* Griffiths. I am not aware of any decision which reaches a case where the person is uncertain.

Per Curiam, Judgment for the Plaintiff."

WILKINSON *v.* ADAM.

1 Vezey and Beames, 422.

Natural Children—under what words entitled.

The opinions of the judges, and the judgment of the Lord Chancellor will inform the Reader sufficiently of the circumstances, and points of the case.

"The following written opinion was sent by Baron Thompson, and the Justices Le Blanc and Gibbs, to the Lord Chancellor.

"The question to which our present opinion will be confined, is, whether the three natural children of John Wilkinson, by Ann Lewis, born before the making of his will of November 29th, 1806, are entitled to take his real estate by force of that will alone.

"The facts, out of which this question arises, are these: Mr. Wilkinson being seised of a very considerable real estate, and possessed of personal property to a very large amount, on the 29th November 1806, made his will, duly executed and attested for passing real estates. At this time he had a wife, Mary Wilkinson, still living, but no children

by her. A woman of the name of Ann Lewis was living with him, by whom he had three natural children: Mary Ann, born July 7th, 1802; Jonina, born August 6th, 1805; and John, born October 8th, 1806. All these children, at the time when the testator made his will, had acquired the character and reputation of being his natural children by Ann Lewis. The testator's wife, Mary Wilkinson, died in December 1806. Subsequent to her death, the testator re-published his will, in the presence of three witnesses. On the 14th of July 1808, the testator died, leaving the said Ann Lewis, and his said three natural children by her, surviving him.

"From the material parts of this will, as they bear upon the present question, we think it most certainly appears that the testator meant the above-mentioned devise to operate in favour of his illegitimate children, born, and to be born, by Ann Lewis, and that he had illegitimate children only in his contemplation.

"The manner in which he describes the children themselves, and Ann Lewis, their mother, as living with him, whilst his wife was then alive, the mode in which he appoints her guardian of such children, the limiting her annuity, and the compensation for the guardianship, to the time of her continuing single and unmarried, together with many other passages in the will, appear to us to place this intention beyond all possible doubt.

"It has been said that the testator might, when he made his will, have looked to the possibility of his wife's dying before him, of his marrying Ann Lewis, and of his having children by her; and that such children may have been the objects of his intended bounty, under the above bequest: but it is impossible for any man, looking through the whole of this will, to suppose that he entertained any such intention; or that he had any such objects in view; and it is observable, that he has evidently contemplated a state of things, in which the event of his marriage with Ann Lewis would have been impossible; and yet his children by her are still to take, for he has bequeathed his mansion-house at Castle-Head, and certain other parts of his property, to his wife for her life, and after her decease to Ann Lewis, for her life, and after

the decease of both, to his children, by Ann Lewis. Now, supposing these several bequests to take place in the order in which they stand, the wife of the testator must have survived him, and his children by Ann Lewis must consequently have been illegitimate. We think therefore, that his illegitimate children, born, and to be born of Ann Lewis, were the intended, and probably the sole intended objects of his bounty. We also think, that if he had any illegitimate children by her, after his will was made, such future children could not have taken for the reason which is to be found in all the authorities upon this subject; that an illegitimate child can only take by his reputed name of child; and that, until he is born, he cannot acquire that name by reputation.

"But with respect to the three children, who were born before the making of the will, the depositions prove most abundantly, that they had then acquired the reputation of being the children of the testator, by Ann Lewis; and thinking for the reasons above given, that they were the intended objects of the testator's bounty, we think that they are intended to take the real estate under the will itself, without the aid or explanation of any other papers.

"It has been argued, though not much pressed, that this devise applies only to future illegitimate children; and is therefore void: but, looking to the different parts of the will, we think it clearly appears (if that were necessary,) that the testator had in his actual contemplation the illegitimate children, who were then born, as well as those whom he might afterwards have by Ann Lewis. It was also urged, that as the testator re-published his will after the death of his wife, and when the event of his marrying Ann Lewis was thereby brought within his own power, it is fairly to be presumed, that, under the description of his children by Ann Lewis, he meant such children as he might have by her, if he should afterwards marry her; but we think, that in the construction of this devise, the intention of the testator is to be collected from the state of things at the time when he made his will, not when he re-published it; and we also think, that if the alteration which took place in the interval between the making and re-publishing his will, were taken into the account, enough would still remain to shew that his

illegitimate children by Ann Lewis, were the objects whom he had in view.

"It was also contended, and this appears to have been the main stress of the argument, that, admitting the intention of the testator to be clear in favour of his illegitimate children by Ann Lewis, that illegitimate children, born before the will, are included, and that the claimants had acquired the name and reputation of being the children of the testator by Ann Lewis; still by the settled and established rules of law they cannot take under the general description of children in this bequest; and a passage in Coke, Litt. 3, b. was cited, and much commented upon, as supporting this doctrine. It is there said that 'a bastard having gotten a name by reputation, may purchase, by his reputed or known name, to him and his heirs; although he can have no heir but of his body. A man makes a lease to B. for life, remainder to the eldest issue male of B. and the heirs males of his body. B. hath issue a bastard son. He shall not take the remainder, because in law he is not his issue; for qui ex damnato coitu nascuntur inter liberos non computentur; and, as Littleton saith, a bastard is quasi nullius filius, and can have no name of reputation as soon as he is born. So it is, if a man make a lease for life to B. the remainder to the eldest issue male of B., to be begotten on the body of Jane S., whether the same issue be legitimate or illegitimate. B. hath issue a bastard on the body of Jane S. This son or issue shall not take the remainder; for (as it hath been said,) by the name of issue, if there had been no other words he could not take; and (as it hath been also said,) a bastard cannot take but after he hath gained a name by reputation, that he is the son of B., &c.; and therefore he can take no remainder limited before he be born: but after he be born, and that he hath gained by time a reputation to be known by the name of a son, then a remainder limited to him by the name of the son of his reputed father is good. But if he cannot take the remainder by the name of issue, at the time when he is born, he shall never take it.'

An illegitimate child cannot take by the

"We collect from this passage, that an illegitimate child cannot take by the description of child of his reputed father, until he has acquired the reputation of being such child:

but that after he has acquired the reputation of being such child, he may take by that description. So Lord Macclesfield appears to have understood it in the case of Metham *v.* The Duke of Devon [a], hereafter referred to; and the Master of the Rolls, in the case of Earle *v.* Wilson [b], recognises this as the doctrine adopted and acted upon by Lord Macclesfield, in the above-mentioned case of Metham *v.* The Duke of Devon.

description of child of his reputed father, until he has acquired the reputation of being such child.

"It was admitted in argument by one of the counsel who opposed the claim of the children, that, taking the intention to be clear in favour of illegitimate children, if the devise had been to the testator's three children by Ann Lewis, it would have been a sufficient designation of them; but he insisted that illegitimate children could never take under the general description of children as a class; and he pointed out several inconveniences, which he supposed would arise out of an enquiry into the fact, whether the several claimants were or were not the children of the testator.

"But it appears to us that the enquiry must be the same in substance, whether the bequest were to the testator's three illegitimate children by Ann Lewis, or to his illegitimate children generally by her; that in the latter, as well as the former case, the inquiry would not be into the fact, but into the reputation of their being such; and that the inconveniences pointed out could never arise, because it is not the fact of the relationship, but the reputation of it, which is to be enquired into in both cases.

"In the former case we should have to enquire, whether each of the persons who presented himself as one of the three children designated by the will, had, or had not, at the time of the will acquired the reputation of being such child: in the latter the nature of the enquiry would be precisely the same; though it might be directed to a different number of objects.

"The case of Godfrey *v.* Davis [c], was cited as an authority against the claim of the illegitimate children in the present case. That was a bequest in remainder to the eldest child,

[a] 1 P. Will. 529. [b] 17 Vez. 528.
[c] 6 Vez. 43.

male or female, of William Harwood; and the Master of the Rolls held that an illegitimate child of William Harwood could not take; although it was known to the testator at the time of making his will, that William Harwood had only illegitimate children: but there William Harwood was a single man, the event of his marrying, and having legitimate children might fairly be looked to: and there was nothing apparent upon the face of the will, or to be collected from the state of William Harwood's family, which shewed that the testator meant by the word 'child' to describe an illegitimate child. In the present case we think, the will itself points clearly and manifestly at illegitimate children.

"It has also been urged against this construction of the devise in favour of the illegitimate children, that, whatever the intention of the testator might be, it was at least a possible event that the testator might survive his wife, and marry Ann Lewis, and have children by her; in which event those legitimate children would answer the description of the testator's children by Ann Lewis, and must necessarily take under the will; and that it is an established and inflexible rule of law, that legitimate and illegitimate children cannot take together under the general description of children. We will take the former part of this proposition to be true; and we think it is so. It was possible that the testator might outlive his wife, and marry Ann Lewis, and have legitimate children by her: the words of the devise are large enough to include such children, and there appears no express intention to exclude them, though probably the testator had them not in contemplation. We incline to think therefore, that such children would take under the devise; but the conclusion drawn from thence, that under the circumstances of this case the illegitimate children cannot take with them, is not, as we think, well founded. We think that the illegitimate children take, because they were clearly meant, and that if legitimate children of the description above-mentioned would also take, it is because the words are large enough to reach them; and the testator expressed no intention to exclude them, though he did not contemplate their existence. When born, they would answer the description

of his children by Ann Lewis, and being born in marriage, though after the will, the devise would as to them be free from all legal objection.

"It is said that this doctrine is opposed by the authority of several decisions, and the cases of Cartwright *v.* Vawdry[d], and Kenebel *v.* Scrafton[e], are cited, and relied on for this purpose. In the case of Cartwright *v.* Vawdry, the testator gives his real and personal estates to his executors, in trust to apply a reasonable part of the produce in the maintenance, &c. of all and every such child or children as he might happen to have at his death, equally, share and share alike, until each of them should attain twenty-one or marriage; then to pay such of them as became of age, or married, one-fourth of the whole income. The testator had one daughter, Mary, who was always treated as, and supposed to be legitimate, but was actually born before marriage, and three younger legitimate daughters. Mary filed a bill for her share as a child: the others were desirous that she should share, but two were under age. It was contended that the division into fourths by the testator, shewed clearly that he meant to include Mary as a child; but the Chancellor (Lord Loughborough) says, 'it is impossible in a court of justice to hold that an illegitimate child can take equally with lawful children, upon a devise to children;' and he proposes, that as all were desirous of giving Mary her share, the cause should stand over until the youngest daughter should attain twenty-one; which was ordered accordingly; and the case does not appear to have been again heard of in court. It cannot therefore be considered as a decision. Lord Loughborough may have thought that the intent of the testator to include his illegitimate daughter was not sufficiently manifest; and the doctrine laid down by him may be considered as applicable to those cases only, in which the word 'children' is used generally without a clear intent; as we think, there appears here on the part of the testator to include illegitimate children. We do not therefore think, that it bears with any weight upon the present case.

[d] 5 Vez. 530. [e] 2 East, 530.

"In regard to Kenebel *v.* Scrafton, the testator, James Bradshaw, having devised all his real and personal estate to a trustee, declared the uses thereof in the following words: 'I give all my personal estate whatsoever and wheresoever, &c. to my dearly beloved Mary Ann Simpson, one of the daughters of J. Simpson, &c. for her sole use and benefit for ever; and I will that out of the rents, &c. of my said estates, my said trustee shall pay unto the said M. A. Simpson, an annuity of 150*l.* for her life; and in case I shall have any child or children by her who shall be living at my decease then I order,' &c.; and he proceeds to make a provision for such children. The will bore date the 28th of January 1795, and the testator had one male child by Mary Ann Simpson then living. This child died on the 9th of June 1795, and on the 29th of August in the same year the testator intermarried with the said Mary Ann Simpson, and had three children by her, two of whom were the defendants in the cause, the other having died. The question was, whether the marriage of the testator, and the birth of these children after the date of the will, operated as an implied revocation of it; and the Court of King's Bench were of the opinion that they did not so operate, holding that those children might take under the will.

"Perhaps it might have been well decided upon the facts of that case, that it did not sufficiently appear that the testator intended to include illegitimate children in the devise; inasmuch as both he and Mary Ann Simpson were single at the time when he made his will, and there was no impediment to their marrying, and having legitimate children, who might be the intended objects of his bounty. From the language of the judgment however, it certainly seems that the court thought that the testator meant to provide for children of a different character and denomination from legitimate; and yet they determine that legitimate children may take under the bequest. In every view of the case we think that they might, because the terms of the devise were large enough to comprehend them: but nothing is said in that judgment from which we can collect that where a devise evidently points at illegitimate children, and where legitimate children are admitted under it, because the words are large

enough to reach them, the illegitimate children cannot take together with the legitimate: nor that even in the case then before the court, if the illegitimate child had been living, he would not have been permitted to take with the legitimate children.

"But if it is an established and inflexible rule, that legitimate and illegitimate children can in no case take together under the description of children, we should rather be disposed to say in the present case, that legitimate children could not take, notwithstanding the generality of the words, than that illegitimate children should be excluded, to the disappointment of the clear and manifest intention of the testator. It is observable that in the present case there are no legitimate children to contend with the illegitimate: but we have reasoned it on the supposition that there were both, as much of the argument was founded on the possibility of that event.

"We have stated the grounds upon which, independent of any authority to the direct point, our opinion in favour of the children is founded, and the manner in which it appears to us that the arguments and authorities urged against the claim of these children, may be answered; but there is one authority directly to the point, that illegitimate children, born, and reputed as such, before the will, may take as a class under the general description of children. We allude to the case of Metham against the Duke of Devon[f].

"That case arose upon a devise of 3000*l.* by the late Earl of Devon to all the natural children of his son, the late Duke of Devon, by Mrs. Heneage; and the question was, whether the natural children of Mrs. Heneage, born after the will, should take a share of the 3000*l.* No question was made but that the children born before the will, might legally take, and the Chancellor (Lord Macclesfield,) in stating the objection to the claim of children born after the will, clearly explains the ground upon which he thought the children born before the will, might take under that bequest.

"He says that bastards cannot take, until they have gained a name by reputation; and again afterwards, that a bastard

[f] 1 P. Will. 529.

could not take until he had a reputation of being such a one's child; and that reputation could not be gained before the child was born. It is evident, therefore, that under the description of all the natural children of his son, by Mrs. Heneage, the Lord Chancellor thought that all who had acquired the reputation of being such children before the will was made, might legally take: and consequently that the enquiry must be, not who were in point of fact such children, but who had acquired the reputation of being so.

"For these reasons we think that the three children of the testator John Wilkinson, by Ann Lewis, who had acquired the reputation of being such children before the date of his will, are entitled to his real estates under the will alone, without the aid of any other papers.

"A. Thompson,
"S. Le Blanc,
"V. Gibbs."

"The Lord Chancellor,

"I have been favoured with the opinion of the three judges on the second point; how far this book is to be considered as describing the individuals who are to take under the will. The judges state their opinion in the following terms:

"'Upon this point, as it regards the real estate, we agree in thinking the testator does not refer to the book, as containing the description of the persons to take under the will; and it cannot be resorted to as part of his will for the purpose of ascertaining them.'

"This is expressed in very cautious and particular terms; from which I understand they do not go the length of saying, that no part of the book can be considered as part of the will. I believe they intended that, but it may mean, that attending to the particular manner in which the testator in that book refers to subjects, as to which he gives directions, the reference is not to that part of the book, or that it does not make it part of the will. I collect however their opinion, that it must be by force of the will itself that these natural children are to take, and that they cannot have the benefit of the contents of this book as a description of them.

"As this is a case furnishing questions, not only of considerable importance, but of difficulty, and which probably may go to the House of Lords, I should not think it right to state merely my opinion upon the two points, without the reasons; and before the conclusion of the cause I shall have an opportunity of conversing with the judges, and understanding precisely the grounds on which they proceeded.

"The Lord Chancellor,

"This is a case in which the testator being a married man at the date of his will, his wife then living, and having no legitimate children, it is proved as a fact that he had three infant children born of a woman named Ann Lewis, which three children, it appears proved, had gained the reputation of being his natural children. After the execution of his will he appears to have frequently re-published it; but it is only material to notice that he did re-publish it, after he had in a book expressly stated by a paper, not attested by three witnesses, who were the individuals he meant by the description of certain devisees in his will. He re-published the will by a codicil, duly attested, of a date subsequent to that description; and one question that was made is, whether that book is to be taken to be part of the will as to the real estate[f].

"The two concluding clauses of the will, which must be taken as speaking from the moment of the last re-publication, have reference to the book which has been produced, and it was particularly pointed out by Mr. Preston, that in one of these codicils, proved in the ecclesiastical court, the testator takes notice of the place where he wishes to be buried. Upon this question the judges have certified their opinion, that this book cannot be resorted to for the purpose of explaining who are the persons intended to take; and I take them to have expressed their opinion so, in order to avoid concluding the question, whether that book might be resorted to as evidence of the reputation, to fix the character of children upon these three devisees. I say nothing at present upon that question, as I remain of the opinion I expressed, that I find no authority to justify me in holding that

[f] Vide Supra, p. 67.

this book, with reference to the devisees, can be taken as part of the will, as to the real estate. It is not necessary to examine how far all the dicta to be found, where a will, attested by three witnesses, refers to an antecedent paper, can be supported; but there was no period of this testator's life, in which it could be asserted, that if he had died at the moment, any book whatsoever would have formed part of his will. The book was ambulatory to the last moment of his existence; and it is impossible, upon the principle of the case of Smart *v.* Prujean [b], to maintain that this book was part of the will as to the real estate. If it could have been so considered, it would not have been necessary to consider the other question upon the will, as those papers would have given a distinct description of the persons intended: but if they are not to be taken as part of the will, it is necessary to consider the testator's meaning, as it is to be collected agreeably to the rules of law upon the will itself.

"This is, as I have observed, the will of a man, married, his wife living at the time, having no legitimate children, but three infants sufficiently proved to be at that time his reputed children by Ann Lewis. The question is, whether those three children, who had gained the reputation of being the children of this testator, previously to the will, can take the property devised by these words, being illegitimate, or whether the construction is not to be such children as he might have by Ann Lewis legally, in case his wife should die, and he should marry Ann Lewis, and have legitimate children by her.

"Child," &c. primâ facie means legitimate.

"The rule cannot be stated too broadly, that the description, 'child, son, issue,' every word of that species must be taken primâ facie, to mean legitimate child, son, or issue: but the true question here is, whether it appears by what we call sufficient description, or necessary implication, that the testator did mean these illegitimate children, and to view the case as accurately as is necessary for the purpose of a determination of that question, we must consider what would have been the effect, not only with reference to children, who had at the time of making the will gained the reputation and character of being his children, but also as to future illegitimate children, who, though not to be considered

[b] 6 Vez. 560.

as his children at the moment of their birth, might have acquired that character before his death; and we must see what would have been the effect if it had happened that, surviving his wife, he had married Ann Lewis, and had legitimate children by her. The case has been very ably argued upon the view of all these events.

" In all the cases that I have seen, having relation to this question, the illegitimate children, if they were to take, must have taken, not by any demonstration arising out of the will itself, but by the effect of evidence dehors, read, or attempted to be read, with a view to establish, not out of the contents of the will, but by something extrinsic, who were intended to be the devisees; and if my judgment upon this case is supposed to rest upon any evidence out of the will, except that which establishes the fact, that there were individuals who had gained by reputation the name and character of his children, that conclusion is drawn without sufficient attention to the grounds on which the judgment is formed: my opinion being, that, taking the fact as established, that there were children who had gained the reputation of being his children, it does necessarily appear on the will itself, that he intended those children. If that principle is just, and this case falls within its reach, all the cases cited are inapplicable to this.

" In the case of Godfrey *v.* Davis[1] whatever was proved in the cause, nothing resulted from the will itself, shewing, that the testator knew those circumstances which were reasoned upon. There is no doubt that child might have been persona designata: but the question was, where the will furnished nothing but the general description, 'the child of William Harwood,' those terms were a sufficient indication of that intention. The question then, consistently with that case, will be, what is necessary in a will, describing the devisee under the general term 'child,' to enable the court to say, there is sufficient in that will, particularly to point out and manifestly and incontrovertibly to shew that the testator intended a natural child; taking the whole description together. With that decision I perfectly agree: my opinion

[1] 6 Vez. 43.

being, that there was not enough in that will to shew, that the natural child was the persona designata. Harwood was a single man, who might marry, and might have legitimate children; but the question in this case is as to a man married at the time of making the will, and stating incontrovertibly, that he thought his wife would survive him. What could he mean by describing these as his children; the children of a person, who, it is plain, supposed he should die before he could get rid of the connexion he had by marriage, with another woman.

The case of Cartwright *v.* Vawdry [a] also appears to me to be rightly decided: by the language of the will in that case the testator appears to have had in contemplation, that there might be more or fewer children at her death, than there were, when he made his will; which is very material to this case. Though, it is true, there were three legitimate children, and one illegitimate, the circumstances of the direction to apply the income in fourths can only afford a conjecture; as if, between the time of his will and his death, one or two of these children had died, the division in fourths would have been just as inapplicable as it was in the case that happened. The question, therefore, only comes to this,—whether the single circumstance of his directing the maintenance in fourths, compelled the court to hold by necessary implication that the illegitimate child was to take by implication with the others, as much as if she had been, in the clearest and plainest terms, persona designata; and my opinion is, that this circumstance is by no means sufficient. That testator, it is clear, had made a will, which, though his death followed so quick, would have operated in favour of all his children, however numerous they might have been; and in favour of subsequent legitimate children, even if every legitimate child he had before, had died. It was, therefore, impossible to say, he necessarily means the illegitimate child; as it is not possible to say, he meant those legitimate children. That will would have provided for children, living at the time of his death, though not at the date of his will. It could not be taken to describe two classes of children,

[a] 5 Vez. 530.

both legitimate and illegitimate. Without extrinsic evidence it was impossible, upon the will itself, to raise the question. The will itself furnished no question, whether legitimate or illegitimate children were intended: but the question upon which the court was to decide, was furnished by matter arising out of, not in, the will.

"The case of Kenebel *v.* Scrafton[1] had for a considerable time very great weight with me upon this question. The point immediately before the court was, whether the will of that testator, who was an unmarrried man, was revoked by his marriage and the subsequent birth of children. The opinion of the court, consistently with former authorities, was, that as marriage alone will not revoke a will, though connected with the birth of a child it will, yet those two circumstances would not have that effect, the will containing a provision for children, if the testator should have any.

Marriage alone not a revocation of a will; as with the birth of a child it is. Exception, where the will provides for children.

"Upon what can be collected from what was said by the court, and from the argument, there was nothing upon the face of that will, raising a necessary implication, that legitimate children were not to take; or that legitimate and illegitimate children could not take together, as it has been argued here, under the same description. It would be very difficult to make out, that they can so take: but that was not a difficulty with which the court had to contend in that case. If the court had thought that those words meant illegitimate children, the necessary effect of the subsequent birth of children would have been, that the will would have been revoked. We may conjecture that he meant illegitimate children, if he did not marry; yet notwithstanding that may be conjectured, the opinion of the court was, as mine is, that, where an unmarried man, describing an unmarried woman as dearly beloved by him, does no more than making a provision for her and children, he must be considered as intending legitimate children, as there is not enough upon the will itself to shew, that he meant illegitimate children; and my opinion is, that such intention must appear by necessary implication upon the will itself.

"With regard to that expression 'necessary implication,'

[1] 2 East, 530. Vide Supra, p. 347.

I will repeat what I have before stated from a note of Lord Hardwicke's judgment in Coriton *v.* Hellier; that in construing a will, conjecture must not be taken for implication; but necessary implication means, not natural necessity, but so strong a probability of intention, that an intention contrary to that which is imputed to the testator, cannot be supposed.

Necessary implication imports, not natural necessity, but so strong a probability that an intention to the contrary cannot be supposed.

"I do not notice Earl *v.* Wilson[m] and all the other cases, as they only go to this; that the description of son, child, &c. means primâ facie legitimate son, &c.; and all the cases, from the passage in Lord Coke[n], establishing, that a bastard may take by purchase, if sufficiently described, amount to no more than he must make that out upon the will itself.

Bastard may take by purchase, if sufficiently described; and having acquired the reputation of the child of a particular person.

"It was stated, with great force, that a decision in favour of these children, would introduce evidence which no court ought to endure; that the mother must be called, for the purpose of enquiring from her, whether the illegitimate children were begotten by the testator or by other persons. That is not so. All the cases which negative the possibility of a natural child taking, under the general description of 'the child of which A. is enseint by me,' &c. are authorities that this is not the species of evidence by which the court enquires who are meant; but the evidence of that is, that A. has acquired the name and character of son, or child, by reputation; and whatever disappointment it may be supposed a testator would feel, if, having had no concern with the creation of that child, he could see what was going on, yet, that child, if it had obtained the reputation of being his child, would take under that description; though if he had been aware of the real fact, he would have prevented that by an alteration of his will; but the true question is, had the child acquired a name and character that entitled the court to say,—that child is the person to take?

"It was stated, very ably, that this might have done, if the description had been by a nick-name, a bodily infirmity, the place of birth, or residence of the child; and it seems to be admitted, that if the testator had spoken of his three

[m] 17 Vez. 528.

[n] Co. Lit. 3. b.

children by Ann Lewis, that would have done; but it is said, they cannot be described as a class. If that description would have done, the ground must be, that the evidence establishes who are to take by reputation; not as evidence of the fact. If you are to enquire who was the father of the children, you must do so in the same manner when he does not state their number: but in that case also, if it can be proved that there are three children who had acquired the reputation of being his children, they would take; and, if he had mentioned three children, and only two could be found who had the reputation of being his, those two only would take, though three were mentioned; not being expressly named in his will.

"It was strongly urged farther, that though he might give to three children, by a description amounting to a *designatio personarum*, he could not give to natural children, as a class; supposing he had used those words instead of any equivalent expression. Upon that question, whether he could give to natural children, as a class, whatever might have been my opinion, if this were *res integra*, the case of Metham *v.* the Duke of Devon [o], which has determined that a testator may give to natural children, as a class, has never been disturbed; and if it is to be now disturbed, this is not the place for that.

"It is farther contended however, that, if natural children, then born, may take as a class, future natural children cannot. It is quite unnecessary now, to decide that question. Here are no after-born children; and, with regard to the expression, 'which I may have,' though obviously future, yet upon the whole, it is clear that by those words, the testator meant to describe persons then, at the date of the will, in existence. Whether the cases cited from Lord Coke [p], which are all cases of deeds, have necessarily established that no future illegitimate child can take, under any description in a will, whether that is to be taken as the law, it is not necessary to decide in this case. I will leave that point where I find it, without any determination. It was farther argued, with great force, that if this testator had lived until

[o] 1 P. Wms. 529. [p] Co. Lit. 3 b.

the death of his wife, as he did, and had afterwards married Ann Lewis, and had legitimate children by her, those children must have taken; and legitimate and illegitimate children cannot both take under the same description; and it would be very difficult to persuade me that they can: but, if my opinion is right, that upon the contents of this will the testator is proved to have intended illegitimate children, that question never could have arisen; as then, though the devise is to illegitimate children, marriage and the birth of legitimate children would have the same effect as upon a devise to any stranger.

"The question, therefore, comes round to this; whether upon the contents of this will it is possible to say, he could mean, at the time of making that will any but illegitimate children; a married man, with a wife, who he thought would survive him, providing for another woman, to take after the death of his wife, and for children by that woman: it is impossible that he could mean any thing but illegitimate children; and, if that devise would have comprehended legitimate children, that would be by an operation of law, that would have been an entire surprise upon him; as he could not mean legitimate children by this will. If the will itself shews that, without any other evidence than what proves who were reputed to be his children, and, that being established, the will itself shews he meant to provide for them, so providing for them as necessarily to shew that they are his devisees, there is no authority that the devisees, whose character is so necessarily to be collected from the will, are not capable of taking.

"The conclusion is, that these three children are upon the will itself, the whole taken together, without looking at the book, entitled to take, as the devisees of this testator.

"The injunction was dissolved: and the bill dismissed[a]."

[a] Swaine v. Kennerley, post.

SWAINE *v.* KENNERLEY.

1 Vesey and Beames, 469.

"JAMES SWAINE, by his will, dated the 24th of August, 1796, devised his real estates to John Kent and Samuel Kennerley, their heirs and assigns, upon trust, by mortgage or sale to raise the sum of 2100*l.* and lay out the same in their own names, in the purchase of freehold lands, &c. and settle the same to the use of all and every the child and children of the testator's late son, Thomas Swaine deceased, equally to be divided between or amongst them, to hold as tenants in common and not as joint tenants, and to the respective heirs of the body or bodies of all and every such child and children issuing.

"The testator's son, Thomas Swaine, left three children, of whom the plaintiff only was legitimate; the other two, Thomas and John Swaine, being born before marriage. The bill prayed a declaration, that the plaintiff was entitled as tenant in tail in equity, to the whole 2100*l.*, &c. All the children were living at the date of the will.

Under the description of 'children' in a will, illegitimate children, existing at the date of the will, not entitled, unless proved by the will itself to be intended; and evidence can be received only for the purpose of collecting, who had acquired the reputation of children. An only legitimate son therefore held entitled as devisee.

MACKINTOSH *v.* TOWNSEND.

16 Vezey Jun. 330.

"WILLIAM MACKINTOSH, by his will, dated 5th April, 1797, amongst other things, directed that the interest of 5000*l.* should be invested, in trust, with the magistrates of Inverness for the time being, and that the interest of such

Legacy to be laid out in land in Scotland, established not being

within the statute, 9 Geo. 2. c. 36.

sum should be appropriated for the education of five boys, in succession, to be selected from the descendants of different families named; and the said sum of 5000*l.*, as soon as might be expedient, was to be invested in lands, in the country.

"By a codicil, dated April, 1798, at sea, the testator gave some directions in the selection of boys for education, as to the preference of the families.

"By another codicil, dated in London, June 10, 1800, he gave 5000*l.* 'in trust with the magistrates of Inverness, added to the 5000*l.* in the first part of his will, intended there for the education of certain boys, the interest of which two sums, making in all 10,000*l.*,' he directed to be paid to Mrs. Rae, during her natural life, and 'after her decease, that sum was to be vested in lands, for the education of boys, as above.' He then directed, that the interest of whatever sums of money might appear above the legacies, should be appropriated to the education of boys, during the life of Mrs. Rae, directing the 10,000*l.*, after her death, to be finally, and for ever secured on lands, for the education of boys, as formerly directed.

"By two other codicils, the testator revoked the bequest, in favour of Mrs. Rae, and directed that the 10,000*l.* should, immediately upon his own death, be appropriated for the education of boys, as before described; and he appointed the plaintiff his residuary legatee.

"The LORD CHANCELLOR, in delivering his judgment on this case, observed, that upon examining the case of Oliphant *v.* Hendrie[a], in the register book, there appeared to be nothing special in it. The testator gave a sum of money, to be laid out in heritable securities in Scotland, for charitable purposes; and Lord Thurlow's decree was, that the legacy was good. This was a direct decision upon the point, and if he had more doubt upon it that authority bound him to determine that this was a good bequest."

[a] 1 Bro. C. C. 571.

BRODIE *v.* BARRY.

Vesey and Beames, vol. 2. p. 127.

Heir at law of heritable property in Scotland, being a legatee of personal property in England, put to election. Being a married woman, the interest of her husband, by his marital right not affected.

" ALEXANDER BRODIE by his will, dated the 9th of August, 1810, duly attested for devising freehold estates, devised and bequeathed to trustees, their heirs, executors, &c. all his freehold, leasehold, copyhold, and other estates, whatever and wheresoever situate, in England, Scotland and elsewhere, and all his personal estate whatsoever and wheresoever, upon trust to carry on his works for three years; and out of the produce, dividends and interest, as well as the rents of his estates, in the first place to pay salaries to the managers of his works, and the surplus to divide equally among his nephews and nieces, who should be living at the time of his decease, share and share alike; and at the expiration of the said term of three years, to sell and dispose of all his freehold and copyhold messuages, &c.; and the money to arise from such sale to form a distributable fund, and be payable, as after-mentioned in any codicil: and as to all the residue of his estate, not consisting in money, upon trust to consolidate it into one gross sum, and subject to, and in default of appointment, to pay it equally among all his nephews and nieces, share and share alike; as to the shares of three nieces, being married, for their separate use for life, with remainder to their respective children, and for want of children to sink into the residue.

" The testator died on the 6th of January, 1811, without issue, not having made any appointment, and leaving the defendant, Charles Brodie, his grand-nephew, heir at law, and customary heir by the law of England, and the defendant,

Betty Cock, one of his married nieces, mentioned in the will heiress by the law of Scotland, of all his heritable property in that country. The bill was filed by his other surviving nephews and nieces, submitting, that though the testator intended to dispose of all his real estate in Scotland, and all such his estate there as by the law of that country descends to the heir, comprised under the description of heritable property, yet the will not being conformable to the solemnities required by the law of Scotland, and therefore not passing such real estate and heritable property, the defendant, Betty Cock, ought not to be permitted to take such heritable property, in opposition to the will, and also a share of the other real and personal estate, as one of the nieces of the testator, but ought to be put to her election, and praying, that she may be decreed to elect accordingly.

" The answers submitted, whether the defendants, Brodie and Cock, ought to be put to their election; and as to the defendant David Cock, taking no interest under the will, the property being given to the separate use of his wife, whether he could be called upon to make such election as to the estate for life, to which he is entitled by the law of Scotland in the heritable property, descending in his wife.

" The Master of the Rolls.

As to the reason of the distinction between conditions implied and expressed, with reference to election, as applied to freehold and copyholdestates against the heir, quære.

" If it were now necessary to discuss the principles upon which the doctrine of election depends, it might be difficult to reconcile to those principles, or to each other, some of the decisions which have taken place on this subject. I do not understand why a will, though not executed so as to pass real estate, should not be read for the purpose of discovering in it an implied condition concerning real estate, annexed to a gift of personal property, as it is admitted it must be read when such condition is expressly annexed to such gift[a]. For, if by a sound construction such condition is rightly inferred from the whole instrument, the effect seems to be the same as if it were expressed in words. And then if it be rightly decided, that a will defectively executed,

[a] Boughton *v.* Boughton, 2 Vez. 12. Sheddon *v.* Goodrich, 8 Vez. 481.

is not to be read against the freehold heir, I have been sometimes inclined to doubt whether any will ought to be read against the copyhold heir; a will, however executed, being as inoperative for the conveyance of copyhold estate, as a will defectively executed is for the conveyance of freehold estate.

Distinction as to supplying the want of surrender in certain cases to support a devise of copyhold estate, and refusing to aid a defective execution of a devise of freehold.

" It is true, however, that a court of equity does for certain specified purposes look at a will of copyhold estate, to discover the intention, and will supply the want of a surrender, in order to effectuate the intention so discovered, but has never attempted to supply the want of the statutory formalities in the execution of a will of freehold estate. We cannot therefore reason conclusively from the one case to the other. But whatever may be the foundation of the distinction, it is established; and what is now to be considered is, whether it be applicable to the decision of the case now before the court.

Real property regulated by the law of the country where the land lies: personal property by that of the domicil.

" This is, or is not, a case of election according as the English will is, or is not to be read against the Scotch heir. Where land and personal property are situated in different countries, governed by different laws, and a question arises upon the combined effect of those laws, it is often very difficult to determine what portion of each law is to enter into the decision of the question. It is not easy to say how much is to be considered as depending on the law of real property, which must be taken from the country where the land lies, and how much upon the law of personal property, which must be taken from the country of the domicil, and to blend both together, so as to form a rule, applicable to the mixed question, which neither law separately furnishes sufficient materials to decide.

Intestate domiciled in England, leaving real estate in Scotland, the heir being one of the next of kin, entitled to share according to the law of England,

" I have argued in the House of Lords cases in which difficulties of that kind occurred. Two of the most remarkable were those of Balfour *v.* Scott [b], and Drummond *v.* Drummond. In the former a person domiciled in England, died intestate, leaving real estates in Scotland. The heir was one of the next of kin, and claimed a share of the personal estate. To this claim it was objected, that by the law of Scotland, the heir cannot share in the personal pro-

[b] Stated in Somerville *v.* Lord Somerville, 5 Vez. 750.

not subject to the condition of collating the real estate, according to the law of Scotland.

perty with the other next of kin, except on condition of collating the real estate, that is, bringing it into a mass with the personal estate, to form one common subject of division [c]. It was determined however, that he was entitled to take his share without complying with that obligation. There the English law decided the question.

Intestate, domiciled in England, having real estate in Scotland, the real estate charged with a heritable bond, as the primary fund, according to the law of Scotland; and not exonerated by the personal estate, according to the law of England.

"In Drummond *v.* Drummond, a person domiciled in England, had real estate in Scotland; upon which he granted a heritable bond [d], to secure a debt contracted in England. He died intestate, and the question was, by which of the estates this debt was to be borne. It was clear, that by the English law the personal estate was the primary fund for the payment of debts. It was equally clear, that by the law of Scotland the real estate was the primary fund for the payment of the heritable bond. Here was a direct *conflictus legum.* It was said for the heir, that the personal estate must be distributed according to the law of England, and must bear all the burthens to which it is by that law subject. On the other hand it was said that the real estate must go according to the law of Scotland, and bear all the burthens to which it is by that law subject. It was determined that the law of Scotland should prevail, and that the real estate must bear the burthen.

"In the first case the disability of the heir did not follow him to England, and the personal estate was distributed as if both the domicil and the real estate had been in England. In the second the disability to claim exoneration out of the personalty did follow him into England, and the personal estate was distributed as if both the domicil and the real estate had been in Scotland.

Question, whether an instrument of any given nature or form, is to be read against an heir, for the purpose of election, as belonging to the law of real property, de-

"Now what law is to determine, whether an instrument of any given nature or form, is to be read against an heir at law, for the purpose of putting him to an election, by which the real estate may be affected. According to Lord Hardwicke, and the judges who have followed him, that is a ques-

[c] Ersk. Inst. Law of Scotland, 701. (5th edition).

[d] As to the effect and nature of an heritable bond, see Bell's Commentary on the Laws of Scotland, 206. Ersk. Inst. 194, and Hope's Minor Pract. 35.

tion belonging to the law of real property, for they have decided it by a statute which regulates devises of land. Upon that principle, if the domicil were in Scotland, and the real estate in England, an English will, imperfectly executed, ought not to be read in Scotland, for the purpose of putting the heir to an election; and upon the same principle, if by the law of Scotland no will could be read against the heir, it would follow that a will of land, situated in Scotland, ought not to be read in England, to put the Scotch heir to an election.

"Doubting much the soundness of that principle, I am glad that the case of Cunningham *v.* Gayner, relieves me from the necessity of deciding the question, as whichever law is applied to the decision of the present case, the result will be the same. As to the law of England, a will of land in Scotland must be held analogous to that of copyhold estate in England, and the will is equally to be read against the heir. It was said, a will of copyhold estate may have some effect here upon the copyhold: that is, if there is a previous surrender; but then the estate does not pass by the will, which operates only as a declaration of the use. In that respect there is no difference between a copyhold and land in Scotland; for if in Scotland there be a conveyance previously executed, according to the proper feudal forms, the party may by will declare the use and trust to which it shall enure. If the law of Scotland is resorted to as the rule, the case alluded to determines that the English will may be read against the Scotch heir, for the purpose of putting him to an election; that too in the strongest case that could occur, for the will is stated to have been made on death-bed: liable therefore to the double objection; first, that a will cannot affect land; and secondly, that on death-bed no valid conveyance whatever could have been made; yet it was held, that as the heir took benefits under that will, it was not competent to him to dispute any part of its operation.

"Upon the whole, therefore, the heir must make his election. The marital rights of the husband, who derives no benefit from that will, cannot be affected by that election."

termined by the statute, regulating devises of land.

Effect of that, where the land is in Scotland and where the domicil is in Scotland, the estate in England, and an English will imperfectly executed. As to the soundness of the principle, quære.

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WHERE a will is suppressed or destroyed, relief may be had, if the property is real estate, in the Court of Chancery; and if personal estate, in the Ecclesiastical Court; but proof must be exhibited of the existence and contents of the will. The substance and effect however, under such circumstances, are usually all that can be expected to be proved; and where this is done, the will so withheld or destroyed will be established according to the effect substantiated in evidence. A very recent case[a] at the Commons, was decided upon this ground. The testator made his will in August, 1813, and bequeathed his property to two of his illegitimate children, and appointed D. their guardian, and his own trustee and executor. The testator died in January 1814; D. went the morning after his decease to his house, and finding there the brother of the deceased, read the will to him. The brother being angry at finding that nothing was left to him, snatched the will out of D.'s hand, and destroyed it. The paper propounded, was an affidavit, purporting to contain the substance of the will.

The Court, after hearing the evidence read, was of opinion that the facts of the case were fully proved, and pronounced for the substance of the will, as contained in the affidavit.

[a] Hendy *v.* Hendy, Prerog. Court, 8th of February, 1815.

FINIS.

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* The word 'equitable' stands in the margin of page 44, by mistake for 'customary.'
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